

A UNITED STATES HUMAN RIGHTS POLICY FOR THE 21ST CENTURY

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* © Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School. This Article, based on the 2001 Richard Childress Lecture, delivered at Saint Louis University School of Law on October 3, 2001, draws extensively on views formed and expressed during my tenure as U.S. Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001. Part II, on events after September 11, 2001, shares thoughts and ideas with my chapter on *Preserving American Values: The Challenge at Home and Abroad*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11*, at 143 (Strobe Talbott & Nayan Chanda eds., 2001) [hereinafter *THE AGE OF TERROR*], Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23 (2002), the 2001 Harrell-Bond Lecture at Oxford University, and lectures delivered at Connecticut College, Case Western Reserve School of Law and the Harvard Law School Human Rights Program. Rather than updating Part II to reflect events that change daily, Part II largely reflects the views I expressed one month after the September 11 tragedy.

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Three special friends paid me special honor by joining me on the Childress Lecture stage. First, Senator Tom Eagleton, who pioneered Congress's charting of the war powers and the intelligence fields. Second, Professor, Ambassador and former Deputy Mayor of New York City Phillip Trimble, who journeyed cross-country to comment on my lecture, just weeks after September 11, an event into which his life's experience had given him absolutely unique insight. Third, one of my oldest and dearest friends, Associate Dean Joel Goldstein, who over the years has shared his wisdom, humor and the power of his mind with me as one does with only very special friends. Finally, I thank the other extraordinarily accomplished colleagues who took from their precious time to contribute to this special volume of the *Saint Louis University Law Journal*: Mark Weston Janis, Derek Jinks, Juan Mendez, Aryeh Neier, Michael Posner, Catherine Powell, David Sloss and Ruti Teitel. Neither human rights work nor legal scholarship are so lonely when one has such remarkable friends.

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I am honored to deliver this illustrious lecture in the memory of Dean Richard Childress, an inspirational leader in both legal education and human rights, who left as his legacy a solemn conviction that justice should not only be taught, but also demonstrated. In this lecture, let me try to follow his injunction by asking the question that has preoccupied my own thinking for much of the last decade, namely: what should U.S. human rights policy be for the twenty-first century?¹

Since its founding, the United States has promoted international human rights as a rhetorical cornerstone of its foreign policy. Yet, particularly since World War II and the emergence of the international human rights movement, the United States has been criticized for the gap between its stated human rights principles and its political actions. In this lecture, I want to talk about *human rights principles* and *human rights strategy*.

I want to argue first, that a twenty-first century U.S. human rights policy should be conducted according to four simple principles, which I tried to apply during my tenure as Assistant Secretary of State for Democracy, Human Rights and Labor:

1. For articles discussing these issues, see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189 (1994); Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 IND. L. J. 1397 (1999); and Harold Hongju Koh, *Introduction to the 1998 Human Rights Report*, in U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998 (released Feb. 26, 1999), http://www.state.gov/www/global/human_rights/1998_hrp_report/overview.html; Harold Hongju Koh, *Introduction*, in U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (released Feb. 25, 2000), http://www.state.gov/www/global/human_rights/1999_hrp_report/overview.html [hereinafter 1999 COUNTRY REPORTS].

1. *Telling the Truth*
2. *Consistency toward the Past*: Promoting accountability mixed with reconciliation
3. *Consistency toward the Present*: Applying what I will call the technique of "Inside-Outside Engagement" with countries that violate human rights and with private actors that can help promote human rights improvements, and
4. *Consistency toward the Future*: A three-part challenge that requires employing mechanisms to give
 - *Early Warning* of human rights disasters,
 - Using *Preventive Diplomacy* and if necessary, force backed by diplomacy; and
 - *Building Democracy in All its Dimensions*

My second, and equally important, argument is that in the new millennium, the United States should not apply those principles piecemeal, but rather employ them as part of a much larger human rights strategy. One of the most overlooked global trends of the last thirty years is what I will call the "globalization of freedom:" the expansion of global freedom from fewer than twenty-five democracies worldwide only fifty years ago, to some 120 today.² But what are the implications of this overlooked globalization for U.S. human rights policy? Let me suggest that in the twenty-first century, the United States government must promote democracy and human rights worldwide—including at home—both as ends in themselves and as critical means to a safer, healthier, more prosperous process of globalization. The United States should support the growing globalization of human freedom, not just as an end in itself, but also because more global freedom provides needed and humane solutions to modern global problems, such as environmental degradation, international crime and terrorism, transborder trafficking and refugee flows, and the spread of global AIDS.

Sadly, I cannot discuss this topic without acknowledging that, since this lecture was first scheduled, both the shape of the twenty-first century and America's role in it have dramatically changed. The September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon have become a defining moment for this generation, just as President Kennedy's assassination became the defining moment for mine and Pearl Harbor had been for my parents'. On September 11, the globalization of freedom was threatened by another kind of globalization—the globalization of terror—and with it our sense of national invulnerability, peace of mind, and certainty about the future have been horribly

2. These statistics are drawn from Freedom House, *Democracy's Century: A Survey of Global Political Change in the 20th Century* (1999) [hereinafter Freedom House survey], <http://www.freedomhouse.org/reports/century.html>.

shattered. This tragedy has had a profound and personal impact on all of us,³ but in my judgment, these tragic events do not call for abandonment of the human rights principles and strategy outlined above. To the contrary, I believe that the September 11 tragedy requires that we reaffirm these principles and apply them to the new crisis that we now face.

So let me divide this lecture into three parts: First, a review of the bureaucratic lessons I learned as an ivory-tower academic trying to make human rights policy at Foggy Bottom, second, an explanation of the general human rights principles and strategy that I favor as guideposts for a twenty-first century U.S. human rights policy, and third, an explanation of why the crisis that has come upon us with September 11 now calls on us, more than ever, to adhere to and apply these precepts in the months ahead.

I. A GENERAL APPROACH TO HUMAN RIGHTS POLICY

A. *Bureaucratic Lessons*

I have spent most of the past ten years reflecting on how to promote democracy and human rights. I began my professional career as a private and government lawyer, working primarily on questions of international business and trade law that have traditionally been viewed as "private international law." Starting in 1991, I shifted both my theoretical and academic focus toward questions of public international law and international human rights, particularly through a human rights clinic that my students and I formed to bring domestic lawsuits on behalf of victims of human rights abuses. Ironically, when the Clinton Administration took office in 1993, I was suing it for human rights violations as counsel of record in the Haitian refugee case, and later as counsel for Cuban refugees.⁴ So when, in the spring of 1998, Secretary of State Madeleine Albright asked me to become her chief human rights adviser and defender of U.S. human rights practices around the world, my first thought was that I had far more to lose than to gain by joining the U.S. government. What finally convinced me to accept the job were the words of my old professor at Harvard, the late Abe Chayes, a former legal adviser at the State Department who later sued the United States at the

3. In our case, we lost the wife of a former boss of mine who was a passenger on the hijacked plane that struck the Pentagon, as well as the husband of a former student who worked on the 89th floor of the World Trade Center. One of my closest friends works just floors above an employee who tested positive for anthrax after opening her mail. Each was placed in jeopardy by doing everyday things that any of us could have done, and indeed, could still do tomorrow.

4. The Justice Department had filed a Rule 11 motion against me for filing a frivolous lawsuit, although the U.S. government eventually modified its repatriation policy and reimbursed us for all of our costs and fees. See Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994). For an account of the Cuban refugee case, see Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994) (Allen Chair issue).

World Court in the Nicaragua case. Abe once said, whether inside or outside the government, "[t]here is 'nothing wrong,' . . . 'with holding the United States to its own best standards and best principles.'"⁵

The two and one-half years that followed were easily the most exciting years of my life. In that time, I took over 150 foreign trips; traveled to some fifty-five countries; and endured the crises of Kosovo, Sierra Leone, East Timor and Colombia, all the while commuting home every weekend to that hub of American transportation—New Haven, Connecticut—to see my family.

It was also the most astonishing learning experience of my life. I learned countless micro-lessons about diplomacy.⁶ But more fundamentally, I learned three big lessons:

1. It's a lot harder than it looks,
2. Don't forget your own agenda, and
3. To preserve your priorities, state your principles.

Let me say a few words about each.

First, *it's a lot harder than it looks*. A former teammate once told a story about the late Mickey Mantle of the New York Yankees, who, having been told that he would not play the next day, went out and got terrifically drunk (as he was wont to do). The next day, he arrived at the ballpark, thoroughly hung over, and in the late innings was unexpectedly called upon to pinch-hit. After staggering out to the field, he hit a tremendous drive to left field for a home run. After running around the bases, he squinted out at the wildly cheering crowd and confided to his teammates, "[t]hose people don't know how tough that really was."⁷

In much the same way, I learned that the making of U.S. foreign policy is infinitely harder than it looks from the halls of academe. Why? Many reasons.

First, as lawyers, we are accustomed to the relatively orderly world of law and litigation, which is based—as intense as it may be—on a knowable and identifiable structure and sequence of events. The workload comes with courtroom deadlines, page limits and scheduled arguments. But if conducting litigation is like climbing a ladder, making foreign policy is more like driving the roundabout near the Coliseum in Rome. One feels that there are no rules; no norms; people are free-lancing from every direction; and you never know when or from where the next problem will come.

5. David E. Rosenbaum, *Abram Chayes, John Kennedy Aide, Dies at 77*, N.Y. TIMES, Apr. 18, 2000, at B8. For Chayes' account of the Nicaragua case, see Abram Chayes, *Nicaragua, the United States and the World Court*, 85 COLUM. L. REV. 1445 (1985). See also Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT'L L.J. 7 (2001).

6. The three most important, I soon decided, are: (1) When you see a bathroom, use it; (2) When you see a dry cleaner, use it; and (3) Always carry your own bottled water.

7. JIM BOUTON, *BALL FOUR: MY LIFE AND HARD TIMES THROWING THE KNUCKLEBALL IN THE BIG LEAGUES* 30 (1970).

Second, in this maelstrom of bureaucratic politics, you are only one person, and there is only so much that any one person can do. No matter how much you think you know, your initial learning curve about both bureaucracy and policy is incredibly steep and the bitter truth is that no competitor in the bureaucracy is particularly anxious that you succeed.⁸ Having a place in the bureaucratic structure gives no guarantee that you will actually be part of the decision-making process, and it takes great energy, perseverance and sheer hard work simply to insert oneself and one's bureau into that process.

Third, for those of us who come from the private sector, the government infrastructure and resources seem ludicrously scarce: in terms of computers, money, professional staff, support personnel, you name it. United States government employees regularly do impossible things without the basic office tools that those of us in the private sector have come to take for granted.⁹ A corollary is that unexpected constraints are placed even on those few resources you have—by virtue of governmental regulations, classification requirements, and the like.¹⁰

Fourth, collective government decision-making creates enormous coordination problems. On any given issue, not only did my bureau (the State Department's Bureau of Democracy, Human Rights and Labor) need to reach consensus decisions with all of the other interested State Department bureaus, but our Department as a whole then needed to coordinate its positions not just with other agencies, such as, Defense, Justice, Labor, U.S. Trade Representative, Interior, Education, Health and Human Services and the White House (particularly the National Security Council), but also at the multilateral level with scores of other countries whose bureaucracies were equally, if not more, complex. However critical one may be of America's Kosovo policy, I was astonished as someone who had rarely witnessed three professors agree on where to go to lunch, to watch the bureaucratic structures of nineteen democratic countries coordinate a joint military

8. When I first began as head of the State Department's Human Rights bureau, a colleague took me aside and said, "You know, in the State Department, we hate four things—political appointees, functional bureaus, lawyers, and professors."

9. When I first arrived at my bureau of more than 100 people, for example, I was shocked to learn that only three computers had access to the Internet, and one of those was an unauthorized telephone hookup set up by employees who had tired of having to do their work by surfing the World Wide Web at home.

10. State Department employees were not allowed, for example, to use Palm Pilots in their work for fear that the information on them might be "beamed" to other, unauthorized users. When traveling on the other side of the world, I could not receive draft documents over the Internet on a laptop in my hotel room, as other American business travelers would do; even in the middle of the night, I had to wake up embassy personnel and travel across town to receive those documents on a classified embassy workstation.

campaign in Kosovo for more than seventy days, using tens of thousands of meetings, phone calls, e-mails and cables.¹¹

Fifth, for better or worse, you are part of a team. As academics, we are accustomed to being individualists, but in foreign policy, a team member cannot publicly criticize every team decision that he or she loses. To shape or to be meaningfully involved in any long-term decision-making process, you must be willing to be overruled or even to lose particular decisions in order to ensure your participation and influence in future decisions.

Sixth, even bureaucracies have constituencies. At the same time as I was making and participating in decisions, under severe time pressure and resource constraints, I was forced simultaneously to think about how to explain those decisions to our varied constituencies: the press, members of Congress and their staff, democracy and human rights nongovernmental organizations (NGOs), intergovernmental institutions, foreign governments and various other publics.

The most difficult factor is the constant pressure of crisis management. Wisely or not, the American public expects its government to respond to any crisis that erupts anywhere in the world, whether or not that crisis was previously considered critical to our self-perceived national interests. At least three of the crises that broke out during my tenure—in Kosovo, Sierra Leone, and East Timor—arose in places that most Americans had never heard of. Yet, in each of these crises, we felt the imperative to respond. The result: the urgent drives out the important. Forward planning of any kind becomes extraordinarily difficult. Your life is no longer your own. If you travel with the Secretary, you must go where and when she wants to go. Your unscheduled travel must be coordinated with your scheduled travel, other crises at the office and the priorities of your personal life. All of this makes it exceedingly hard to distinguish potential watershed moments in our foreign policy from the crisis of the day.

A final factor is the relationship between present and future. At the same moment that you are trying to increase your resources and enhance your leverage on the bureaucracy, you must play the hand that you have been dealt. If you misplay that hand, and make the wrong decision, you may find yourself “turfed out” on that issue for weeks and months to come. So you must constantly ask: are you “playing” on those issues where you can really make a difference? Where do you and your bureau have a comparative advantage? And how do you marshal your current resources to bring that comparative advantage to bear so that you can meaningfully influence policy and enhance your future resources and influence?

11. For an illuminating account of the Kosovo campaign by the Supreme Allied Commander in Europe during that campaign, see WESLEY K. CLARK, *WAGING MODERN WAR* (2001). Academics often talk about what “the world community” should do. But now I view the global human rights community like the proverbial dog that walks on two legs: Given the practical difficulties, it is amazing that any human rights response happens at all.

That brings me to Lesson Two: *Don't forget your agenda*. The best description anyone gave me of what foreign policy decision-making would be like was walking onto a tennis court and being handed a racket, and asked to return any balls that come over the net. At the beginning, the balls come so fast that you can't return any, but over time, you eventually find the pace and start to return most of them. Then you decide that you should not simply return them willy-nilly, but should do so with some kind of game plan. So you begin trying to return all of the balls, for example, to the same side of the court. But the critical moment comes when you put down the racket and ask yourself: "Why am I the one not serving the balls?" It is at that moment that you remember that you took the job in the first place not simply to react to other's initiatives, but because you had certain proactive goals. If you want to put your own stamp on policy, your greater goal must be somehow to bring greater policy coherence to the chaos.

But how do you maintain your priorities in this reactive policy world? When I entered the government, many well-meaning people advised me to come to work each day with three things I wanted to get done. That advice sounds good, but almost invariably, the day you come to work intending, say, to build rule of law in Kosovo, to secure the release of a prisoner in China, and to promote inclusion of a human rights provision in a multilateral treaty, that turns out to be the day that thousands of refugees flee from East to West Timor. By the end of the day, you may have returned many tennis balls, but have done precious little to promote your three original policy priorities.

So how do you preserve your priorities? That brings me to my third lesson. After considerable thought, I concluded that *the best way to preserve your priorities is to announce your principles*. What that means is: Set for yourself certain guiding principles that you will try to maintain during your time in public office. State those principles publicly in the speech in which you accept office, and announce that you will repeat them in the speech with which you leave office. Make sure that your subordinates understand those principles. Repeat them daily. And make sure that others in the bureaucracy know you have bound yourself to those principles, so much so that you would rather resign than violate those principles.¹² You must make sure that everyone around you knows that your principles are more important to you than your job. If you follow this lesson, I found, it is amazing how such a simple decision can strengthen your hand in the bureaucratic fight. The reason is simple: surprisingly, many others in the bureaucracy have no announced principles. If they know that you have announced principles that control your position, they tend to seek your support by arguing that the position they favor follows from your principles. Over time, you find that more and more of your bureaucratic interlocutors are speaking, and thinking, about pending decisions in terms of your principles. In fighting the daily bureaucratic

12. As a university professor with a 500-mile commute and a tenured position to which I could return, I had the rare luxury of being able to make this threat credibly.

fight, those principles then become both a checklist and a guide for all concerned. They also become your own bottom line: you are willing to win some bureaucratic fights and lose others, but you would rather resign than sacrifice the guiding principles you hold most dear.

But having said all of this, what should those guiding twenty-first century principles be?

B. Human Rights Principles

1. A Page of History

To understand where we should be going, it is worth quickly reviewing where we have already been. Since the signing of the Universal Declaration of Human Rights in 1948, the “human rights paradigm,” as you could call it, has evolved through four overlapping, but identifiable phases.

First, in the wake of the Holocaust, the paradigmatic human rights violation was genocide. To prevent future genocides, global human rights policy principally focused on standard-setting, and to some extent—with the Tribunals at Nuremberg and Tokyo—on accountability and on institution-building. But the principal focus of this first era—“the age of universalization”—was on the universalization of human rights norms. On examination, these standard-setting efforts found remarkable success. International human rights law has won nearly universal acceptance from nations around the globe and has been formalized through many instruments. Although in practice abuses continue, since the 1993 Vienna World Conference on International Human Rights, few now seriously question the universality of international human rights norms.

In the second phase, the Cold War, the focus on genocide began to recede and the human rights paradigm shifted to reflect Cold War realities. The focal point of global concern shifted from mass murder to the plight of individual dissidents and prisoners of conscience. We can think of this as the period of political prisoners like Sakharov, Mandela and Sharansky, when response mechanisms began to focus more insistently upon human rights monitoring and advocacy. Norms became institutionalized, not just through intergovernmental institutional mechanisms, but also through national and regional mechanisms. It is during this “age of institutionalization” that the State Department human rights bureau that I served came into being.¹³ President Jimmy Carter decided early in his presidency that “the demonstration of American idealism was a practical and realistic approach to

13. In 1976, Congress enacted legislation creating a Coordinator of Human Rights in the Department of State, a position that was later upgraded to Assistant Secretary of State for the Bureau of Human Rights and Humanitarian Affairs. In 1994, that bureau was reorganized and renamed as the Bureau of Democracy, Human Rights and Labor. *Preface*, 1999 COUNTRY REPORTS, *supra* note 1, http://www.state.gov/www/global/human_rights/1999_hrp_report/preface.html.

foreign affairs, and [that] moral principles were the best foundation for the exertion of American power and influence.”¹⁴ Responding to the nation’s post-Watergate, post-Vietnam disgust over the perceived amorality of the Nixon-Kissinger foreign policy, Congress passed an extensive body of legislation conditioning foreign assistance to certain countries on their forbearance from consistent patterns of gross human rights violations.¹⁵ This era also witnessed the institutionalization and dramatic growth of such non-governmental organizations as Amnesty International, Human Rights Watch and the Lawyers Committee for Human Rights.

But at the same time, during this period, United States human rights policy was extensively criticized for its lack of honesty and consistency. Particularly in its annual human rights reports on Latin America, the State Department was accused of whitewashing human rights records to keep United States assistance flowing. Few new accountability mechanisms were developed, and the United States was charged with applying inconsistent standards toward communist and anticommunist regimes.¹⁶ Nor did the Administration have any discernible strategy for preventing future human rights abuses. The notable exception was President Reagan’s June 1982 address to the Houses of Parliament, which called for a broad public-private effort “to foster the infrastructure of democracy—the system of a free press, unions, political parties, universities—which allows a people to choose their own way, their own culture, to reconcile their own differences through peaceful means.”¹⁷ But Congress was suspicious of what Reagan called “Project Democracy” as a narrow campaign to generate popular support for the Administration’s pro-*contra* policy in Nicaragua, and rejected that project in 1983.¹⁸

14. JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT* 143 (1982).

15. That effort was pioneered by Congressman Don Fraser of Minnesota, who in the 1970s, held numerous hearings before the House Foreign Affairs Committee’s Subcommittee on International Organization and Movements that led to the enactment of a series of laws designed to elevate the status of human rights in U.S. foreign policy. *See generally* FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 502-44 (1990) (discussing these laws). *See, e.g.*, Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795 (codified as amended in scattered sections of 22 U.S.C. (1994)); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 19 U.S.C. (1994)); International Bank for Reconstruction and Development Act of 1977, Pub. L. No. 95-118, 91 Stat. 1067 (codified as amended in scattered sections of 22 U.S.C. (1994)).

16. *See, e.g.*, Tamar Jacoby, *The Reagan Turnaround on Human Rights*, 64 *FOREIGN AFF.* 1066, 1074 (1986) (noting that “the Administration’s larger strategy in El Salvador . . . seemed to show a careful and informed concern for human rights abuses but managed largely to disregard them when it came to helping the Salvadoran armed forces”).

17. President Ronald Reagan, *Promoting Democracy and Peace* (June 8, 1982), at <http://www.iri.org/reaganspeech.asp> (last visited Oct. 5, 2001).

18. At the same time, however, Congress approved the National Endowment for Democracy, a government-financed, private nonprofit fund which has continued to this day to make significant grants to business, labor and political party institutes to give support for the

In 1989, as the Cold War ended, a third phase began: the era of “operationalization.” As ideology became a less salient factor, Francis Fukuyama famously (and falsely) declared that we had reached the “end of history.”¹⁹ But as we now know, history did not end. Instead, the focal point shifted from ideology to identity, and we saw a horrific renewal of ethnic conflict and refugee outflows. The paradigmatic violation became not genocide or imprisonment of dissidents, but group and ethnic conflict. The search for solutions shifted toward preventive diplomacy, sanctions, and the development of what I call “transnational networks.”²⁰ These networks—comprised of governments, intergovernmental organizations, NGOs, and courageous individuals—“transnational norm entrepreneurs,” like Aung San Su Kyi, the Dalai Lama, Jose Ramos Horta, Bishop Carlos Belo and others sought to operationalize the norms of international human rights law. Now supplemented by these transnational public and private networks, the various institutional mechanisms for enforcement of human rights norms grew more robust and varied in their operational techniques.

Today, more than a decade after the end of the Cold War, we have entered a fourth phase, what I call the “age of globalization.”²¹ It is a complex phase of history in which all of the elements that I have described are now simultaneously present. We live in a world in which the threat of genocide has not been dispelled, in which dissidents remain imprisoned, in which ethnic and group conflict continues to rage. In this world, conflict has few boundaries and a complex new order has supplanted the realist world order dominated by sovereign states. Increasingly, individuals owe multiple loyalties, not just to the governments that rule their geographic area, but also to sub-national ethnic groups and broader global religious, ethnic, cultural and issue-based movements. Disputes escalate

development of political parties and electoral processes overseas (particularly the National Democratic Institute, of which former Secretary of State Madeleine Albright is now the chair, and the International Republican Institute, of which Senator John McCain is now the chair). For accounts of how American democracy-promotion efforts have proceeded since the pivotal 1982 Westminster speech, see generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 30-32 (1999); TONY SMITH, *AMERICA’S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY* (1994).

19. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

20. For a description of how these transnational networks function, see Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998), MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998).

21. Indeed, my Yale colleague Cold War historian John Lewis Gaddis argues that we should think of the September 11 attacks as marking the formal end of the post-Cold War era. See John Lewis Gaddis, *And Now This: Lessons from the Old Era for the New One*, in *THE AGE OF TERROR*, *supra* note *, at 1:

We’ve never had a good name for it, and now it’s over. The post-cold war era—let us call it that for want of any better term—began with the collapse of one structure, the Berlin Wall on November 9, 1989, and ended with the collapse of another, the World Trade Center’s twin towers on September 11, 2001.

rapidly. Groups are regularly pitted against groups and civilians are regularly subjected to human rights abuses, be they relief workers, NGO workers, doctors, nuns, journalists or children. Massive abuses of human rights, including intentional targeting of civilians, have increasingly become viewed as an effective means of carrying out this kind of international struggle.²²

The U.S. government has only begun to address the human rights challenges of this new age of globalization. Although the first Bush Administration used the rhetoric of human rights and international law in responding to the reunification of Germany, Iraq's invasion of Kuwait and the massacre at Tienanmen Square, it never fully defined its vision of the proper role of human rights in this "New World Order."²³ While President Bush presided over human rights advances in Eastern Europe, South Africa, Central America, to name several areas, he never articulated why human rights should take consistent priority in U.S. foreign policy, and left office with human rights crises roiling in Bosnia, Haiti and Somalia.

During the 1992 campaign, then-candidate Bill Clinton recognized and attacked this failing.²⁴ Shortly after the Clinton Administration took office, at the Vienna World Conference on Human Rights in 1993, Secretary of State Warren Christopher announced an ambitious program for giving human rights a high priority in America's post-Cold War foreign policy agenda.²⁵ "In the post-Cold War era," he declared, "we are at a new moment. Our agenda for freedom must embrace every prisoner of conscience, every victim of torture, every individual denied basic human rights."²⁶ "[A]dvancing democratic values and human rights serves our deepest values as well as our practical interests," he said, "[t]hat is why the United States stands with the men and women everywhere who are standing up for these principles. And that is why President Clinton has made reinforcing democracy and protecting human rights a pillar of our foreign policy . . ."²⁷ But in the first Clinton term, dramatic policy failures in Haiti, Bosnia, and Rwanda

22. We saw this in Bosnia, where civilians were raped and shot *en masse*, as well as in Rwanda, in Sierra Leone, Kosovo, East Timor, where militias killed and looted, hacking civilians to death on the very doorstep of the U.N. compound, and most recently on September 11 itself, where thousands of innocent civilians were intentionally targeted by terrorists.

23. For a history of this period, see GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* (1998).

24. "Our nation has a higher purpose than to coddle dictators and stand aside from the global movement toward democracies . . . President Bush seems too often to prefer a foreign policy that embraces stability at the expense of freedom." Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, *supra* note 1, at 2427 n.206 (quoting Governor Bill Clinton, Remarks to the University of Wisconsin Institute of World Affairs (Oct. 1, 1992)).

25. See WARREN CHRISTOPHER, *IN THE STREAM OF HISTORY: SHAPING FOREIGN POLICY FOR A NEW ERA* 61 (1998).

26. Warren Christopher, *Democracy and Human Rights: Where America Stands*, 4 DISPATCH 441 (U.S. Department of State Bureau of Public Affairs June 1993), available at <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1993/html/Dispatch4no25.html>.

27. *Id.*

undermined his Administration's efforts to articulate and sustain a principled human rights policy.²⁸

Beginning with the Dayton Peace Accords, the Clinton Administration finally began to develop a more nuanced tool kit for addressing situations of human rights abuse in the post-Cold War order.²⁹ The appointment of Madeleine Albright as Secretary of State and Richard Holbrooke as U.S. Ambassador to the United Nations—two experienced diplomats and foreign policy activists with strong public commitments to human rights—gave leadership to a revived democracy and human rights agenda within the Clinton Administration.³⁰ That agenda began to recognize that the new world order, although still characterized by intense state activity, also embraces proactive international institutions, multinational enterprises and nongovernmental organizations; regional and global markets; a plethora of new decisional fora; transnational networks that link governmental and nongovernmental entities; and an exploding information technology that has significantly de-territorialized global communication, commerce and finance. Emerging response mechanisms grew to include intergovernmental institutions trying to apply international norms, transnational networks, new tools of accountability—such as the Yugoslav and Rwandan War Crimes Tribunals—and new forms of monitoring. Particularly in Europe, the eastward expansion of North Atlantic Treaty Organization (NATO), the European Union and the Organization of Security and Cooperation in Europe spurred a complex process of institutionalizing and operationalizing human rights norms into governmental bureaucratic structures. And where the Clinton Administration faltered—most notably in its initial failures to sign the International Criminal Court treaty and the Landmines Convention—transnational networks of human rights activists, now

28. For a critique of these failings, see Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, *supra* note 1.

29. For the definitive inside account of how those accords arose, see RICHARD HOLBROOKE, *TO END A WAR* (1998).

30. Some of the leaders of that agenda within the Clinton Administration, with whom I had the pleasure of working, included: National Security Adviser Sandy Berger, Deputy Secretary of State Strobe Talbott, Albright's Counselor Wendy Sherman and Chief of Staff Elaine Shocas, her senior policy adviser and later Special Representative for Democracy in the Balkans James O'Brien, the Director of the Policy Planning Staff Morton Halperin, my predecessor John Shattuck, the Senior Director for Human Rights, International Operations and Humanitarian Affairs at the National Security Council Eric Schwartz, Undersecretary of State for Global Affairs Frank Loy, Deputy Secretary of the Treasury Stuart Eizenstat, Assistant Secretary of State for Population, Refugees and Migration Julia Taft, Ambassador-at-large for War Crimes David Scheffer, Ambassador-at-large for International Religious Freedom Robert Seiple, Ambassador to the U.N. Human Rights Commission Nancy Rubin, Assistant Attorney General for Civil Rights Bill Lann Lee, Deputy Administrator of the Agency for International Development Hattie Babbitt, Joseph Onek, the State Department's Global Rule of Law Coordinator, and the Secretary's Special Representative for International Labor Affairs Sandra Polaski.

armed with the Internet, pressed the Administration relentlessly to revise its policies.³¹

2. Truth, Justice, Engagement, and the Democratic Way

In dealing with this new and complex landscape of the “age of globalization,” what should the guiding principles of United States Human Rights policy be? The day after I was sworn in as Assistant Secretary for Democracy, Human Rights, and Labor, I overheard my eight year-old son tell a friend that his father had just become “Assistant Secretary for Truth, Justice and the American Way.” Upon reflection, I decided, that description is not far off. In my view, the proper goals of American human rights policy in the twenty-first century should be promoting Truth, Justice, Engagement and the Democratic Way. Let me elaborate upon each of these four principles.

a. Telling the Truth

The United States’ first and most important task is to *tell the truth* about human rights conditions around the globe, however painful or unwelcome that truth might be. The State Department’s annual country reports on human rights practices, issued each February, now supplemented by annual country reports on religious freedom (mandated by the International Religious Freedom Act of 1998),³² present a comprehensive and enduring record of human rights conditions worldwide for each calendar year. These reports now form the heart of U.S. human rights policy, by providing the official human rights information base upon which all branches of the federal government can make policy judgments. The reports are a unique document worldwide as well, providing critical data for the media, international organizations, researchers, and nongovernmental organizations.³³

31. President Clinton ultimately signed the International Criminal Court treaty on December 31, 2000 and declared the United States’ intent to sign the Landmines Convention by 2006. For a description of how transnational networks functioned, for example, to help create the Landmines Convention, see generally Koh, *supra* note 20.

32. The International Religious Freedom Act of 1998, §102(b)(1), 22 U.S.C. § 6412 (1994 & Supp. V 1999), provides that the Secretary of State shall transmit to Congress by September 1 of each year, or the first day thereafter on which the appropriate House of Congress is in session, “an Annual Report on International Religious Freedom supplementing the most recent Human Rights Reports by providing additional detailed information with respect to matters involving international religious freedom.” During my time at the State Department, Robert A. Seiple was appointed the first Ambassador-at-large for International Religious Freedom.

33. The first of these reports, issued in 1977, ran only 137 pages and covered only a fraction of the world’s countries. The last volume of the twentieth century covered 194 countries and totaled approximately 6,000 pages in typescript. When the 1999 reports were placed on the World Wide Web, well over 100,000 people read or downloaded parts on the first day that they appeared. 1999 COUNTRY REPORTS, *supra* note 1.

With respect to these and other reports, special investigations and monitoring,³⁴ executive branch certifications to Congress under various foreign assistance and trade bills, and asylum country profiles (all of which were prepared by the Bureau of Democracy, Human Rights and Labor), I gave only one directive: that those persons preparing the report be convinced that it represented the truth as they understood it. As a lawyer, I acknowledged that the unvarnished truth may sometimes be hard to determine, and even harder to hear. I also recognized that reasonable minds could differ dramatically about what *policy consequences* should flow from the same truthful reporting about human rights conditions in particular countries. To take some examples from recent history, there was little or no material difference between the State Department reports and those of the NGO and intergovernmental community about human rights conditions in Colombia, China and Sudan over the last few years, although there have been significant policy disagreements about how, precisely, to respond to those conditions. But in my experience, legitimate policy differences will be far narrower—and can be resolved in a much more deliberate and thoughtful manner—if we all agree that the facts have not been bent in order to achieve a particular policy outcome.³⁵

But it is not enough for the United States to tell the truth about human rights conditions in foreign countries. It is equally important that we tell the truth to the world about our own country's human rights conditions. The State Department has no congressional mandate to report on human rights conditions in the United States, but in recent years, we have finally ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), and the Convention on the Elimination of all Forms of Racial Discrimination (CERD), and we have begun to submit treaty-mandated reports to the experts who sit on those Treaty Committees.³⁶ The central message of each of these reports has been

34. During the Kosovo crisis, for example, my bureau led production of two special State Department Reports on Ethnic Cleansing in Kosovo and a third assessing the state of the Kosovo judicial system. See U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING* (Dec. 1999); *ERASING HISTORY: ETHNIC CLEANSING IN KOSOVO* (1999); *KOSOVO JUDICIAL ASSESSMENT MISSION REPORT* (2000), available at http://www.state.gov/www/global/human_rights/drl_reports.html.

35. A moment of considerable pride for our bureau came when, after many years, the Lawyers Committee for Human Rights chose to discontinue its annual critique of the State Department annual human rights reports (a critique that used to run up to 500-600 pages) on the grounds that the critique was now superfluous, given the essential accuracy of the United States government's reports.

36. The first United States report on the ICCPR was submitted and defended in 1995; the first reports under the CAT (INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE AGAINST TORTURE) and the CERD (INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION) were submitted in 1999 and 2000, respectively. For copies of each of these reports, see http://www.state.gov/www/global/human_rights/drl_reports.html. These reports were prepared principally by the Bureau of Democracy, Human Rights and Labor, and the Office of the

not that the United States is perfect, but that it is trying in good faith to bring its domestic practices into compliance with international standards. In most respects, the United States has been diligent and successful in doing so. Unlike some governments, who choose to ratify many human rights treaties without intending to give them full compliance, the United States ratifies remarkably few, and with so many reservations, understandings and declarations that it conveys the misimpression that it does so with the general intent of noncompliance. This creates the global impression, as Professor Louis Henkin likes to say, that in the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.

In his 1993 Vienna Conference speech, Secretary Warren Christopher announced the United States' intent to ratify such long unratified human rights conventions as the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights.³⁷ But with the Republican victories in both houses in 1994, such ratifications became politically impossible. Absurdly, despite the extraordinary domestic attention paid here to children's rights, we continue to be one of only two nations in the world that has failed to ratify the International Convention on the Rights of the Child (the other being Somalia, which until recently did not even have an organized government!).

Curiously, the United States also fails to tell the truth about our human rights record even in those areas in which we have worked hard to do the right thing. In the same way as we long resisted adoption of the metric system of weights and measures, we regularly fail to use the universal language of international human rights law to describe those areas, such as prohibitions against "torture," in which we apply the most rigorous law enforcement techniques. For example, our

Assistant Legal Adviser for Human Rights and Humanitarian Affairs, with support from various other agencies, particularly the Justice Department (especially the Immigration and Naturalization Service), the Labor Department, and the National Security Council. Each of these reports was then orally defended in Geneva before the relevant treaty body by the Assistant Secretary for Democracy, Human Rights and Labor and the Assistant Attorney General for Civil Rights or a representative of the Justice Department's Civil Rights Division. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998), issued by President Clinton in 1998, marked a particularly important turning point, because it highlighted the responsibilities of the federal government to ensure that all of its domestic policy agencies—federal, state and local—ensure conformity with the human rights treaties to which the United States is a party. The Executive Order created an Interagency Working Group on Human Rights Treaties, chaired by the National Security Council (NSC), and including representatives of State, Justice and other Cabinet departments, to coordinate actions by United States governmental entities taken to ensure compliance with the human rights treaties that the United States has ratified. Exec. Order No. 13107, 63 Fed. Reg. at 68,991-92 (Dec. 10, 1998).

37. See Christopher, *supra* note 26, at 443.

prosecutors and legislators have used the term “police brutality,” rather than the universally recognized term of “torture and cruel, inhuman or degrading treatment” to describe the stationhouse sodomization of Haitian immigrant Abner Louima in New York City a few years ago. That failure has become particularly glaring in the weeks since September 11, when some have independently urged that the United States relax its constitutional prohibition against torture in order to extract information from detainees who are suspected of being terrorists.³⁸

Another failure to speak came at the recent World Conference Against Racism in Durban, South Africa, where Secretary of State Colin Powell declined to appear out of protest over the Conference’s scapegoating of Israel. Had he appeared, he could have used his speech—much as Warren Christopher did at the 1993 Vienna Conference on Human Rights and Hillary Clinton did at the 1995 Beijing Women’s Conference—to tell America’s story. He could have recounted the story of his own remarkable odyssey to become America’s first African-American Secretary of State as living proof of America’s sincere commitment to promoting racial equality.³⁹ By taking the podium, he could not only have told the truth to those who wanted to use the Conference to assert that Zionism is racism, but also could have redirected the Conference agenda toward the real emerging global discrimination issues of the twenty-first century, such as caste discrimination, discrimination against refugees, workable affirmative action techniques and other efforts to give meaningful reparations for past discrimination.⁴⁰

Perhaps most important, we need to tell the truth about those areas in which our national standards, and especially the standards of our several states, now fall below international human rights standards. Perhaps the prime area among these has been this country’s administration of the death penalty against juveniles and retarded persons. Since 1977, when the United States Supreme Court allowed the states to resume the practice of capital punishment, America’s executions have proliferated even as most of the rest of the world (108 countries in all) has moved toward an abolitionist direction. Abolition of the death penalty is now a cornerstone of European human rights policy, and the European Union regularly criticizes U.S. death penalty practices in diplomatic demarches.⁴¹ From my own

38. See, e.g., Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001 at 45; Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001 at A06.

39. The irony is that Secretary Powell himself plainly sees his personal story as emblematic of the American experience. For proof, one need look no further than the title of his best-selling autobiography. See COLIN L. POWELL, *MY AMERICAN JOURNEY* (1995).

40. Cf. Ellis Cose, *Silver Linings From a Summit*, NEWSWEEK, Sept. 17, 2001 at 40 (commenting that the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance “start[ed] a conversation the world sorely needs” on educational and income disparities, discrimination, reparations for slavery and colonialism and gave a much needed forum to members of various marginalized groups).

41. In many European capitals, outrage over American capital punishment has triggered angry street demonstrations, with one former U.S. ambassador even reporting that his embassy

experience in the government, I can testify that these are no longer minor diplomatic irritants. Important meetings between America and its allies are increasingly consumed with answering official protests against the death penalty. I have little doubt that America's continuation of the practice has undermined our claim to moral leadership in international human rights, and probably contributed to our recent, stunning loss of the United States' seat on the United Nations Human Rights Commission.⁴² Most disturbing, our devotion to the death penalty—particularly as administered to minors and persons with mental retardation—provides diplomatic ammunition to countries with far worse human rights records.⁴³

The United States Supreme Court will address this issue in a pending case, *Atkins v. Virginia*.⁴⁴ For the first time in thirteen years, the Court will consider whether execution of persons with mental retardation violates the Eighth Amendment's prohibition against "cruel and unusual punishments," which the Court has interpreted in light of the "evolving standards of decency that mark the progress of a maturing society."⁴⁵ Recently, nine distinguished former American diplomats, with nearly 200 combined years' worth of service under Republican and Democratic presidents, filed a Supreme Court amicus brief arguing that executions of mentally retarded inmates creates diplomatic friction, pits America against its allies, tarnishes America's image as a human rights leader, and harms broader foreign policy interests.⁴⁶ President George W. Bush initially responded to the diplomats' brief by saying we "should never execute anybody who is mentally retarded." He went on, however, to insist that "our court system protects people who don't understand the nature of the crime they've committed nor the

had received an anti-death penalty petition signed by 500,000 local citizens. See Felix G. Rohatyn, *America's Deadly Image*, WASH. POST, Feb. 20, 2001, at A23.

42. See Harold Hongju Koh, *A Wake-Up Call on Human Rights*, WASH. POST, May 8, 2001, at A23.

43. China, for example, regularly deflects international criticism of its own appalling practices by pointing to America's death penalty. When the *New York Times* recently misreported that of all the countries in the world, only Kyrgyzstan and the United States execute mentally retarded persons, Kyrgyzstan's ambassador to Washington rushed to set the record straight, noting that, in fact, the United States now stands alone, because Kyrgyzstan has observed a moratorium on the death penalty since 1999! See Baktybek Abdrisaev, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, at A14.

44. *Atkins v. Virginia*, 534 S.E.2d 312 (Va. 2000), cert. granted, 122 S. Ct. 24 (U.S. Sept. 25, 2001) (No. 00-8452), argued Feb. 26, 2002.

45. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

46. See Brief of Amici Curiae Diplomats Morton Abramowitz et al., *McCarver v. North Carolina*, 548 S.E.2d 522 (N.C. 2001), cert. granted, 121 S. Ct. 1401 (2001) (No. 00-8727), cert. dismissed, 122 S. Ct. 22 (2001). I served as counsel of record to the diplomats on this amicus brief. The Supreme Court dismissed certiorari as improvidently granted in the *McCarver* case, apparently because of North Carolina's enactment of a law prohibiting the execution of those who meet its criteria for mental retardation. The Court then granted certiorari in the *Atkins* case, in which the constitutionality of the current practice will likely be decided.

punishment they are about to receive,” an answer that clearly conflates the judicial protections designed to protect the *mentally insane*, with the much lower protections designed to protect those with mental retardation from execution.⁴⁷

The obligation to tell the truth about human rights conditions applies to our own domestic practices. If President Bush sincerely believed that the mentally retarded should never be executed in America, he should have instructed his Justice Department to file a Supreme Court brief opposing Atkins’ execution, and urged state governors to ban the practice.⁴⁸ Although we are justifiably proud of our domestic human rights record, we have not yet fully internalized human rights norms into our domestic law. If we want to be honest about our own human rights conditions, we have to do more to assure that our asylum policies, our police system, our prison system, and our criminal justice system—particularly the administration of the death penalty—in fact fully comply with international standards.

b. Justice

In implementing a twenty-first century human rights policy, it is necessary but not sufficient to tell the truth about human rights conditions abroad and at home. We also need to take *consistent positions with regard to the past, present and future abuses*.

To maintain consistency with regard to the past, we need to promote principles of accountability for past human rights violations. At the same time, we cannot ignore the reality that societies in which large-scale human rights abuses have occurred also need to achieve internal reconciliation to make the transition to the next phase of their political existence.⁴⁹ In choosing among available accountability mechanisms, no one solution fits all situations. At the same time as one attempts to achieve justice by demanding accountability for the past, one becomes acutely aware that the need for societal reconciliation and transition may require that some practical limits be placed upon the pursuit of accountability.

47. In many states, it is still permissible to sentence to death a person who meets the legal criteria for mental retardation—usually defined as an IQ under 70, low adaptive skills, and early onset of the condition—if, despite a defendant’s developmental disabilities, personal culpability is found. See Harold Hongju Koh, *A Dismal Record on Executing the Retarded*, N.Y. TIMES, June 14, 2001, at A33.

48. *Id.*

49. In recent years, this topic has been the subject of extensive scholarly examination. For some of the best examples, see ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); Ruti Teitel, *From Dictatorship to Democracy: The Role of Transitional Justice*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 272 (Harold Hongju Koh & Ronald C. Slye eds., 1999); MARTHA L. MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

Over the past few decades, a variety of techniques have emerged to balance the need for accountability for past abuses with the need for reconciliation and transition. These techniques now run the spectrum from domestic and international truth and reconciliation commissions—of the kind created in South Africa,⁵⁰ Guatemala, El Salvador, and most recently in Sierra Leone—that principally play a truth-telling and societal reconciliation function, to international criminal justice mechanisms, ranging from ad hoc criminal tribunals, such as the Yugoslav and Rwanda International Criminal Tribunals in the Hague, to the International Criminal Court that was initiated by the 1998 Rome Treaty (and which President Clinton signed less than one month before leaving office).⁵¹ Although many American politicians remain skeptical about (and some, such as Senator Jesse Helms, unalterably oppose) the United States' ratification of the International Criminal Court Treaty, my time in government has left me convinced that we need to ratify the treaty, as soon as politically practicable, in order to work as a treaty party toward the development of an effective and independent international criminal court. As the September 11 tragedy again demonstrates, we cannot fight an unending war against terrorists without an international court that is at once strong enough to bring to justice egregious violators of human rights and humanitarian law, while at the same time, committed to safeguarding the legitimate role of national judicial systems so as not to become a vehicle for frivolous and politically motivated charges.⁵² Once created, an effective and independent court will be a critical part of our tool kit for deterring gross abuses and for ensuring that those who commit gross atrocities do not do so with impunity. As we have seen in recent years, international criminal justice serves multiple functions in a global system of human rights: deterrence, truth-telling and retribution for the victims, but also enunciation of emerging legal norms (for example, the identification by the Yugoslav tribunal of rape in wartime as a crime against humanity),⁵³ as well as delegitimation of political actors who might otherwise seek to play a future role in the political life of an embattled country.

50. See, e.g., ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2000) (describing work of the South African Commission).

51. Again, the literature on the International Criminal Court is massive. See generally WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2001); ALTON FRYE, *TOWARD AN INTERNATIONAL CRIMINAL COURT?: THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES* (1999).

52. See, e.g., Laura Dickinson, *International Justice, Not War, Will Honor our Character While Securing our Safety*, 166 N.J.L.J. 23 (Oct. 1, 2001) (arguing that September 11 tragedy calls for creation of an international court to prosecute terrorists); Elizabeth Neuffer, *Fighting Terror/Diplomacy Justice in Changed World; Debating the Shape of a Terror Court*, THE BOSTON GLOBE, October 28, 2001, at A17.

53. See Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, Trial Chamber II of the International Criminal Court for Yugoslavia (ICTY), February 22, 2001 ("Foca" case), available at www.un.org/icty/pressreal/p566-e.html (last visited Nov. 8, 2001) (holding that rape and sexual enslavement in wartime are crimes against humanity).

There is little doubt, for example, that the indictments as war criminals of Slobodan Milosevic, Radovan Karadzic and General Mladic by the International Criminal Tribunal for the former Yugoslavia rendered each a political pariah, barred from future public service and delegitimated from participation in future negotiations about the future of their countries.

Political delegitimation of those who have ruled by human rights abuse has also been a prime goal of those who have recently invoked *domestic* criminal prosecutions to pursue former dictators. The classic example is the recent, celebrated pursuit of Chilean dictator Augusto Pinochet by courts in Spain, Great Britain,⁵⁴ and now Chile. At the end of the day, Pinochet may never be convicted for international crimes that he almost certainly committed while in office. Nevertheless, the transnational criminal litigation has clearly had the effect not simply of bringing to light extensive new details of his atrocities, but also of transforming Pinochet's status at home from that of honored Senator-for-life to that of discredited former dictator sentenced to de facto house arrest within his own country. Much the same could be said of the less successful effort to indict the former dictator of Chad, Hissène Habréé, in Senegal (where he took refuge in the early 1990s), on charges of torture and crimes against humanity. The Habréé indictment marks the first time that an African head of state was charged with atrocities by the domestic court of another African nation. Although Senegal's highest court finally ruled in March 2001 that Habréé could not be tried in Senegal for crimes committed in Chad, Senegal's President subsequently asked Habréé to leave Senegal (but put that order on temporary hold at the request of U.N. Secretary-General Kofi Annan), again making clear that the criminal accountability effort had diminished Habréé's status from that of honored guest to outcast.⁵⁵

Perhaps the most interesting development in recent years has been the adoption of "hybrid forms" of criminal accountability in Sierra Leone and eventually, perhaps, in East Timor. Under U.N. supervision, a tailored accountability mechanism has been developed that is neither purely domestic nor purely international, but rather, a blend of the two.⁵⁶ In Sierra Leone, where

54. *Regina v. Bartle*, [1999] 2 W.L.R. 827.

55. See *Human Rights Watch, Human Rights News: Senegal's Position on Ex-Chad Dictator Welcomed*, <http://www.hrw.org/press/2001/09/habre0927.htm> (last visited Sept. 27, 2001).

56. See generally Press Statement, Spokesman, Richard Boucher, Adoption of Khmer Rouge Law in the Cambodian National Assembly (Jan. 2, 2001), available at <http://secretary.state.gov/www/briefings/statements/2001/ps010102a.html>. What appears to be a failed effort has occurred in Cambodia, where the National Assembly unanimously approved a draft law to establish an "Extraordinary Chamber" for the investigation and prosecution of senior Khmer Rouge leaders and others most responsible for the mass killing of some 1.7 million Cambodian civilians during the 1975-79 Pol Pot era. The law provided for participation by both Cambodian and international judges, prosecutors, and legal staff. But in a major disappointment, the United Nations recently withdrew from negotiations to set up the tribunal, claiming that Cambodia was unwilling to accept conditions necessary to ensure fair trials. At this writing, that action has cast into doubt

thousands of civilians—including small children—were hideously raped, terrorized and mutilated by rebels under the command of Foday Sankoh and others, U.N. Security Council Resolution 1315 (unanimously adopted in August 2001) authorized the Secretary General to enter into negotiations with Sierra Leone to establish an independent special court—with both domestic and foreign judges—to bring to justice the principal perpetrators of the most serious violations of international humanitarian law.⁵⁷ With luck, a parallel solution may also ultimately be developed for East Timor. Following the violence that ravaged East Timor after the fall 1999 referendum there, the U.N. Human Rights Commission convened a special session that called for both an international commission of inquiry and for the Indonesian Government to investigate and prosecute those responsible for the atrocities associated with the referendum. A government-appointed commission of inquiry produced an extensive and well-documented report, after which the Indonesian Attorney General appointed a sixty-four member team to pursue criminal investigations with a view toward issuing indictments. In addition, the government passed legislation creating a Human Rights Court designed to try violations by local officials of international humanitarian law embodied in treaties and customary law to which Indonesia is bound. Simultaneously, the U.N. Transitional Administration in East Timor (UNTAET) and the Government of Indonesia signed a memorandum of understanding that provides a framework for the sharing of information and might even allow for joint investigations of the East Timor violence. With the recent transition to the Megawati government, the success of these accountability measures will be a critical test of the rule of law in East Timor and Indonesia, a country elsewhere wracked by massive criminal violence against civilians in such other areas of the country as the Moluccas, Aceh, and Irian Jaya. Should the Indonesian authorities fail to bring military commanders and militia leaders to account for the East Timor atrocities and for egregious crimes committed against civilians elsewhere in Indonesia, the pressure will grow to create an international or hybrid tribunal to do the job.⁵⁸

whether a Cambodia tribunal will ever come into existence. See Balakrishnan Rajagopal, *A Blind Eye to Justice in Cambodia*, WASH. POST, Mar. 27, 2002, at A21.

57. Res. 1315, U.N. SCOR, 4186th mtg., U.N. Doc. S/Res.1315 (2000), available at <http://www.un.org/Docs/scres/2000/res1315e.pdf> (Aug. 14, 2000). For a discussion of this Resolution, see also Michael P. Scharf, *The Special Court for Sierra Leone*, ASIL INSIGHTS (Oct. 2000), <http://www.asil.org/insights/insigh53.htm> (last visited Nov. 12, 2001). Significantly, the Lomé Peace Accords also called for establishment of a Truth and Reconciliation Commission in Sierra Leone to complement the trials held before the independent special court. While the special court will likely investigate the key architects of the violence, the vast majority of cases involving lower-level violators will probably fall under the Truth and Reconciliation Commission's jurisdiction.

58. See generally Sidney Jones, *For Indonesia, A Sea of Troubles*, N.Y. TIMES, July 27, 2001, at A19, available at <http://www.hrw.org/editorials/2001/indo-0727.htm>.

In each of these examples, the United States worked with foreign governments and the United Nations in a creative attempt to seek justice for the past by designing hybrid accountability mechanisms with both international and domestic elements. Each solution seeks to take account of both general principles of international law criminalizing genocide, war crimes, and crimes against humanity, without ignoring the unique political needs and complexities of the particular country situation.

In my view, consistency toward the past similarly requires the United States to promote the availability of civil accountability for gross human rights violations in U.S. courts, a phenomenon that I have previously labeled “transnational public law litigation.”⁵⁹ Like other accountability mechanisms, civil accountability combines several goals: compensation of the victims, denials of safe haven to the defendant in the judgment-rendering forum, deterrence of others who might contemplate similar conduct, and enunciation of legal norms opposing the conduct for which the defendant has been found liable. Although most of the judgments rendered by United States courts in these transnational human rights cases remain uncollected, they have nevertheless contributed to the other goals of norm-enunciation, deterrence and denial of safe haven. When plaintiffs have sued under well-defined norms of customary international law, the Executive Branch has regularly urged the federal courts to determine such rules as matters of federal law. In *Filartiga v. Pena-Irala*, for example, the Justice and State Departments together urged the Second Circuit to construe the international law norm of torture under the Alien Tort Claims Act.⁶⁰ More recently, in *Kadic v. Karadzic*,⁶¹ the Solicitor General and the Legal Adviser of the State Department again urged the Second Circuit to vacate and remand the jurisdictional dismissal of an ATCA suit against Bosnian Serb leader Radovan Karadzic, in the process expressly acknowledging the court’s duty to conduct such litigation by “looking to modern conceptions of customary international law.”⁶² In the wake of the September 11 tragedy, some have already suggested that families of victims pursue civil litigation or other kinds of compensatory redress against the assets of terrorist groups and their state sponsors.⁶³ In my view, such efforts would comport with the emphasis on

59. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (reviewing human rights litigation in United States courts under the Alien Tort Claims Act, the Torture Victim Protection Act, and other civil liability statutes).

60. 630 F.2d 876 (2d Cir. 1980). See also Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090); reprinted in 19 I.L.M. 585, 603 (1980) (“Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.”).

61. 70 F.3d 232 (2d Cir. 1995).

62. See Brief of United States as Amicus Curiae at 2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

63. See Margaret Cronin Fisk, *Suits Could Target Other Countries*, NAT’L L.J. Oct. 1, 2001, at A5; *Smith v. Afghanistan*, Nos. 01 Civ. 10132 (HB), 01 Civ. 10144(HB), 2001 U.S. Dist.

retrospective justice that should be the hallmark of our twenty-first century human rights policy for the Bush Administration to support them in those accountability efforts.

c. Inside-Outside Engagement, with Governments and the Private Sector

So much for the past. What strategy should the United States apply in its efforts to minimize on-going human rights abuses?

Before entering government, I had argued in my academic work that a key to understanding whether and when nation-states will comply with international law is *norm-internalization*: the process of institutional interaction by which nations come to incorporate international law concepts into their domestic law and practice. In observing transnational legal process, I argued, we witness cycles of “interaction-interpretation-internalization:” repeated interactions among states and a variety of domestic and transnational actors produce interpretations of applicable global norms which can be and are eventually internalized into states’ domestic values and processes.⁶⁴ Under this theory, various agents of internalization—which include other nation-states, transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, issue linkages and interpretive communities—can provoke nations to move from grudging compliance to habitual internalized obedience with international rules.⁶⁵ Under this theory, a nation’s international isolation can help to explain its scofflaw status,⁶⁶ while on the other hand, repeated efforts by these “internalization agents” to spur a rogue nation’s participation in transnational legal process can help, over time, to encourage its obedience with particular norms of international law.

All of this may sound fine from the ivory tower, but how does this view help promote improvement of human rights conditions in such diverse countries as Burma, Colombia, Cuba, China, Indonesia, North Korea and Turkey? With each of these, the improvement that can be accomplished by sanction alone has limits. Indeed, in any given country, human rights change more frequently comes from the inside, bottom-up, than from the outside, top-down. Therefore, the broader goal in seeking human rights improvement should be to persuade each country, over time, to accept the human rights norms of the international community as internal norms, using techniques of “inside/outside engagement”—such as,

LEXIS 21712 (S.D.N.Y. Dec. 20, 2001). For an early discussion of this possibility, see also Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEXAS INT’L L.J. 169 (1987).

64. For elaboration of this argument, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Koh, *How is International Human Rights Law Enforced?*, *supra* note 1.

65. See Koh, *supra* note 20 (discussing at length the role of these various “agents of internalization”).

66. See, e.g., Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1, 7-20 (2001) (applying this model to sanctions against Burma).

“inside” diplomatic channels for government-to-government dialogue against a background of “outside” sanctions. Thus a consistent strategy to stop ongoing abuses with those countries with whom we have diplomatic relations thus requires us to use an inside/outside approach that combines techniques of *internal persuasion* with techniques of *external pressure*.

Intuitively, the inside/outside engagement approach makes more sense than a policy of applying sanctions alone. If, for example, you and your neighbors want to stop a rich and powerful neighbor from littering the neighborhood or playing loud music, there is only so much you can achieve by threats, calling the police or even by getting a court order. Sanctions and the fear of sanctions may spur short-term compliance, but will just as likely incur long-term resentment and non-cooperation by the target neighbor. Over time, the strategy most likely to work is, therefore, one that uses dialogue and sanctions in concert to persuade the neighbor to follow, and ultimately internalize, the community norm against littering or boisterous music. In short, the policy objective should be not simply short-term behavioral change, but long-term revision of the internalized norms that drive the neighbor’s social conduct.⁶⁷

For the United States, the country that has posed the greatest challenge for ongoing abuses is the Peoples’ Republic of China.⁶⁸ After 1994, when the Clinton Administration de-linked the annual renewal of China’s Most-Favored-Nation

67. In some cases, the United States has internalized international norms into U.S. domestic law, with the goal of promoting similar norm-internalization by other countries. During the Clinton Administration, for example, the United States, with broad bipartisan support, ratified the International Labor Organization (ILO) Convention 182 on the worst forms of child labor. The U.S. delegation to the June 1999 International Labor Conference, which was led by President Clinton, strongly supported this ILO Convention, and supported the President’s eventual signature of an Executive Order in 1999 that prohibited U.S. Government procurement of goods suspected of being made by forced or indentured child labor. To assist with the implementation of Convention 182, the Administration then increased its support of the ILO’s International Program on the Elimination of Child Labor by more than tenfold, becoming the largest single donor to that fund. The Clinton Administration then also reviewed the state of worker rights concerns in countries receiving Generalized System of Preferences (GSP) —a system of concessional trade preferences for developing countries—and in several instances suspended GSP benefits pending correction of outstanding abuses or worked with GSP beneficiary countries to correct abuses. Under the Trade and Development Act of 2000 (TDA), Congress further established a number of special programs—including the African Growth and Opportunity Act and the Caribbean Trade Partnership Act—that required the administration to determine GSP eligibility based on recipient countries’ adherence to a number of international worker rights standards, including the provisions of ILO Convention 182 on the worst forms of child labor. Thus, the internalization of international labor standards into United States law helped spur the parallel internalization of those standards into the laws of other countries trading with the United States.

68. For two recent reviews of our policies towards China, see JAMES MANN, ABOUT FACE: A HISTORY OF AMERICA’S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON (1999); PATRICK TYLER, A GREAT WALL: SIX PRESIDENTS AND CHINA: AN INVESTIGATIVE HISTORY (1999).

Trade Status from human rights conditions, it began to pursue a policy of strategic engagement. After a promising presidential summit in 1998, internal human rights conditions in China deteriorated markedly, with arrests of democracy activists, increased repression in Tibet, a pronounced crackdown on the Falun Gong, and continued use of prison labor, coercive family planning, and administrative detention (so-called "reeducation through labor").⁶⁹ In response, the Clinton Administration deployed an array of inside-outside methods as part of a strategy of principled, purposeful engagement on the human rights issue.⁷⁰ From the inside, we delivered direct diplomatic demarches. We conducted a human rights dialogue in which we reviewed face-to-face with Chinese officials the status of Chinese human rights conditions in each issue area. We expanded people-to-people dialogue with Chinese citizens, and took measures to promote expansion of Internet access and to support the forces of Chinese democratization through meetings with dissidents, Radio Free Asia broadcasts, and the like. From the outside, we publicly condemned illegal arrests, issued human rights reports exhaustively chronicling Chinese human rights abuses, designated China for sanctions under the International Religious Freedom Act, joined with other Western allies—particularly the European Union, Australia, and Canada—to press the Chinese to ratify the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights,⁷¹ and sponsored resolutions each year at the United Nations Human Rights Commission calling attention to China's human rights violations. When China sought admission to the World Trade Organization (WTO), we emphasized our overall goal of bringing China into the international system—whether the international trading system or the international human rights system—but only so long as China plays by international rules. We also sought to cooperate with the Chinese government on rule-of-law projects that would internally revamp Chinese domestic law to make it more compatible with both the WTO charter and the international human rights covenants.

69. For a detailed accounting of this human rights deterioration, see U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *China, in 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES* (released Feb. 25, 2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/china.html; U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *China, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000* (released Feb. 2001), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2000/cap/index.cfm?docid=684>.

70. For a review of our policy approach, see Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, Testimony Before the House Committee on International Relations (January 20, 1999) (concerning human rights in China), *available at* <http://www.mtholyoke.edu/acad/intrel/hongju.htm>.

71. China ratified the International Covenant on Economic Social and Cultural Rights in March 2001. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (Oct. 22, 2001), *available at* <http://www.unhchr.ch/pdf/report.pdf>.

I will be the first to admit that this engagement strategy with China has thus far reaped only limited human rights improvements. Nevertheless, I continue to believe that this strategy is the only reasonable long-term approach to curbing ongoing abuse. Similar inside/outside strategies have been applied—with more noticeable success—to strategic allies such as Turkey, which although already a member of NATO and the Organization for Security and Co-operation in Europe (OSCE) now actively seeks admission into the European Union. In seeking to pave the way for its admission to the European economic system, the Turkish government under Bulent Ecevit has undertaken a highly visible public program to internalize universal human rights norms into domestic law, to liberalize restraints on the press and political parties, to acknowledge minority rights for the Kurdish population in the Turkish Southeast and to forswear the right to execute captured Kurdish terrorist Abdullah Ocalan out of deference to the European Union's (EU's) prohibition on the imposition of the death penalty.⁷²

Over the long term, I believe, we must continue a sustained bipartisan strategy of inside-outside human rights engagement with all countries, especially China, while recognizing that no single government—no matter how powerful—can secure worldwide human rights improvement by itself. To complement that strategy, the United States government must engage private partners as well. By building partnerships with human rights NGOs, corporations, labor unions, international financial institutions, and other organizations, the United States government can advance the common goal of promoting economic and legal modernization and human rights improvement in China. When the United States delinked China's trade status from human rights conditions, it encouraged American companies doing business in China to follow a set of voluntary Model Business Principles (similar to the Sullivan Principles that guided multinational conduct in apartheid South Africa).⁷³ To build on this foundation, the United States government, civil society and business must jointly promote the concepts of *corporate social responsibility*—by which I mean the frank recognition that business profits can no longer stand on a separate balance sheet from human costs in terms of human rights, labor standards and environmental issues—and *corporate citizenship*: the acknowledgement by transnational corporations, as they

72. See generally Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, Remarks before the Commission for Security and Cooperation in Europe, *Human Rights in the Republic of Turkey* (Mar. 18, 1999), available at <http://www.mtholyoke.edu/acad/intrel/turkrite.htm>; Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor, Remarks to the Assembly of Turkish-American Associations (Oct. 1, 1999), available at http://www.state.gov/www/policy_remarks/1999/991001_koh_turkey.html.

73. For materials on this episode, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1109-17 (2d ed. 2000). See also Reverend Leon H. Sullivan, *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 I.L.M. 1464, 1496 (1985).

expand their operations abroad, that they are not merely visitors, but fully responsible citizens of the societies in which they operate.⁷⁴

The key to this strategy of *human rights engagement with the private sector* is stressing that corporate social responsibility in human rights is not just good, but also good for business in at least four ways. First, integrating human rights standards into business practices strengthens the rule of law and the capacity of civil society organizations. By supporting the rule of law and working with local human rights NGOs, multinational companies can greatly strengthen the local business and human rights environment that provides the necessary prerequisite for their own local success. Second, corporate social responsibility increases the opportunities for dialogue among corporations, civil society and the communities where they operate, giving local groups a stake in the foreign corporation's financial success. Third, corporate social responsibility improves the business environment by enhancing corporate reputation and image among local NGOs, consumer groups, community organizations and the media. A positive image can strengthen shareholder confidence and give companies a competitive advantage over other companies not yet adopting such policies. Fourth and finally, corporate social responsibility diminishes security risks. Companies who regularly maintain an open dialogue with local stakeholders are less at risk for strikes, demonstrations and attacks on personnel and equipment. Companies that take the other path, failing to integrate human rights and labor standards into their business practices, often see, by contrast, their reputations damaged, with resulting decreases in share prices, damaged or lost assets, and lost operating time.

In short, coupled with government-to-government engagement, U.S. government engagement with the global marketplace can be a potent way to promote global human rights. In recent years, a number of innovative human rights partnerships have arisen among governments, businesses and civil society, the two best known being U.N. Secretary-General Kofi Annan's Global Compact⁷⁵ and the late Reverend Leon Sullivan's Global Sullivan Principles, both of which seek to set minimum corporate standards for human rights performance.⁷⁶ During

74. At the 2000 Davos World Economic Forum, President Clinton called on nations, in partnership with business, labor and NGOs, to come together and build a world economic system that is more fully inclusive. "[W]e cannot pretend that globalization is just about economics," he said, "economics must be blended with the other legitimate human concerns." President's Remarks to the World Economic Forum and a Question-and-Answer Session in Davos, Switzerland, 36 WEEKLY COMP. PRES. DOC. 181, 193-94 (Feb. 7, 2000).

75. With respect to human rights, "[t]he Secretary-General asked world business to: *Principle 1*: support and respect the protection of international human rights within their sphere of influence; and *Principle 2*: make sure their own corporations are not complicit in human rights abuses." The Global Compact: The Nine Principles, *available at* <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (last visited Nov. 21, 2001).

76. For the Global Sullivan Principles, see LEON H. SULLIVAN, MOVING MOUNTAINS: THE PRINCIPLES AND PURPOSES OF LEON SULLIVAN 106-12 (1998).

my time at the State Department, we applied a similar approach to work with corporations, other governments and the NGO community to improve human rights performance in several sectors.⁷⁷ First, in the oil, mining and energy sectors, we worked with the government of the United Kingdom, human rights and corporate responsibility groups and large American and British companies to develop Voluntary Principles on Security and Human Rights to govern oil company security arrangements in such key developing countries as Colombia, Indonesia and Nigeria. The objective of these principles was to provide companies with practical guidance on how to prevent human rights violations in dangerous environments, while meeting legitimate corporate security requirements.⁷⁸ Second, working with human rights groups and labor unions, the Clinton Administration supported a major Anti-Sweatshop Initiative aimed at programming money to civil society groups willing to engage in creative partnerships to combat sweatshop conditions in overseas industries which produce for the U.S. market.⁷⁹ Third, we began discussions with internet technology and content providers and human rights and democracy NGOs, seeking to ensure that human rights NGOs in developing and transitional countries could have greater access to computer equipment and training and could operate in an environment of unrestricted internet access.⁸⁰

77. See U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (released December 20, 2000) [hereinafter THE VOLUNTARY PRINCIPLES], available at http://www.state.gov/www/global/human_rights/001220_fsdr1_principles.html. For a summary of these principles, see Press Briefing, Harold Hongju Koh et al., Assistant Secretary of State for Democracy, Human Rights, and Labor, Voluntary Principles on Security and Human Rights (December 20, 2000), at http://www.state.gov/www/policy_remarks/2000/001220_koh_hr.html; Sean D. Murphy, *Voluntary Human Rights Principles for Extractive and Energy Companies*, in 95 AM. J. INT'L L. 636 (2001); Bennett Freeman et al., *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 423 (2001).

78. THE VOLUNTARY PRINCIPLES, *supra* note 77, focus on three areas of mutual concern to the companies and human rights groups. First, risk assessments—a set of human rights considerations that the companies take into account, whether legal, technical or political, as they structure and revise their security arrangements in light of local conflicts. Second, interactions between the companies and public security—whether military or police units. Third, the Principles focus on interactions between the companies and private security firms—an area of particular concern to British oil companies, who had been criticized for human rights abuses committed by private firms to whom they had subcontracted their security work.

79. In 2000, this new \$4 million Anti-Sweatshop Initiative began to award grants to groups undertaking voluntary private sector activities to reduce sweatshop practices in overseas factories producing for the U.S. market. John D. Holum, Senior Advisor for Arms Control and International Security, Prepared Statement Before the House Committee on Appropriations Foreign Operations Subcommittee (April 6, 2000), at <http://www.lexis.com> (Federal New Service database).

80. In China, for example, a coalition of human rights groups, governments, private corporate investors and law firms quietly banded together in 2000 to persuade the government to

While these public-private partnerships are still at an early stage, it seems clear that to reduce ongoing abuses, we need a sustained bipartisan commitment to promoting corporate social responsibility. Both American political parties have an interest in advancing U.S. business interests and human rights, and in building and sustaining the political consensus for globalization, open markets and open societies. A close analogy can be drawn to the global anti-corruption movement. In the early '70s, when the Lockheed scandal⁸¹ broke, the conventional wisdom was that corruption was a global way of life that could never be affected by governments, much less transnational corporations, NGOs or intergovernmental organizations. Yet thirty years later, a thriving global "good governance" movement has arisen, marked by the U.S. and other national foreign corrupt practices laws, an Organization for Economic Co-operation and Development (OECD) Antibribery Convention, a transnational network of NGOs (Transparency International) and numerous intergovernmental instruments and declarations dedicated to targeting and eliminating corruption.⁸² What has made the global anticorruption movement successful was that it was "bipartisanized" and promoted as a "race to the top" by a transnational partnership of private and public entities, including corporate leaders. In the same way, no government can promote a "race to the top" in corporate social responsibility and citizenship without forging partnerships with other members of a global human rights community that cross partisan, public/private, and national lines.

In the end, we delude ourselves if we believe that a country as large and powerful as China will change its conduct simply because one other country happens to impose unilateral economic sanctions upon it. The only way to bring about a long-term change in Chinese behavior is to organize an ongoing, sustained, multilateral and bipartisan engagement with China that repeatedly emphasizes the communal values of the global system—values that include not simply open markets, but also democracy, the rule of law and respect for human rights.

d. Strategies of Prevention: Early Warning, Preventive Diplomacy, and Democracy Promotion

For the last five years, my brother Howard, a cancer specialist, has been Commissioner of Public Health of Massachusetts. When I was offered my State Department job, I called him and asked, "Why did you decide to go into the government?" He answered, "Because I'm tired of dealing with the pathology of disease. I want to devote my energies to disease-prevention, not amelioration, and

modify Internet restrictions on the ground that government suppression of information would not only undermine human rights, but also suppress the country's own economic potential.

81. See R.T.A. Irving & Thomas A. Stanley, *Lockheed Scandal*, <http://hkuhist2.hku.hk/Nakasendo/g054.htm> (last visited Feb. 12, 2002).

82. See generally Globalization, "Asian Values," and Economic Reform: The Impact of Tradition and Change on Ethical Values in Chinese Business, 33 CORNELL INT'L L.J. 711 (2000).

I assume that's also what you want to do in your work." The conversation made me realize that the broadest challenge the United States faces is not simply to redress past abuses, or to minimize current ones, but to develop a *consistent strategy to prevent future human rights abuse*, by promoting early warning, preventive diplomacy, and long-term promotion of democracy worldwide in all of its dimensions.

First, early warning: the Rwandan genocide finally made the world acutely aware of how important it is to act early if our goal is to prevent atrocities from occurring.⁸³ The sobering fact is that the problem is usually not an absence of information. Rather, the problem is getting the right information into the right hands at the right moment, before large-scale abuses actually take place, in time to generate the political will necessary to head off the explosion of atrocities. To address this concern, the Clinton Administration created an Atrocities Prevention Interagency Working Group. That group was designed to examine all available information—from NGOs, the media, U.N. relief groups and diplomatic sources in order to get to policy-makers as quickly as possible not only information about imminent atrocities, but also ideas of how to prevent them from occurring. We also convened in 2000 a Conference for Coordinating Atrocity Prevention and Response, in which a number of governments and non-governmental organizations jointly explored the range of feasible measures to enhance international cooperation and coordinated efforts to avert mass acts of violence against civilian populations. The Conference agreed upon a Statement of Principles for International Cooperation to Prevent, Ameliorate, or Prosecute Perpetrators of Atrocities.⁸⁴ The long-term objective of those principles was to create an informal

83. In 1994, Hutu officials in Rwanda incited tens of thousands of Rwandans to kill the Tutsi minority. Although the slaughter was primarily done by machete, more than half a million people, three quarter of the Tutsis in Rwanda, were killed in less than four months, in what one journalist has called "the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki." PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 3 (1998). Thousands of Hutu who opposed the genocidal campaign were also killed. The United States, France, Belgium and the U.N. failed to recognize the warning signs of the coming genocide and did little to stop it. For two heart-wrenching accounts of the Rwandan genocide, and how the great powers failed to prevent it, see generally GOUREVITCH, *supra*, and ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999), at <http://www.hrw.org/reports/1999/rwanda/index.htm>. To his credit, President Clinton eventually told the truth about America's failure. Upon visiting Rwanda in 1998, he admitted, "The international community, together with nations in Africa, must bear its share of responsibility for this tragedy, as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe havens for the killers. We did not immediately call these crimes by their rightful name: genocide." Remarks to Genocide Survivors in Kigali, Rwanda, 1 PUB. PAPERS 431-34 (March 25, 1998).

84. For a discussion of how such principles might prevent future abuses, see David J. Scheffer, Ambassador-at-Large for War Crimes Issues, Remarks at the Conference on Atrocities

atrocities prevention and response network among governments, international organizations, and non-governmental organizations that could identify emerging trends and potential responses and help coordinate policy options to be raised at the appropriate governmental and intergovernmental levels.⁸⁵

Second, if there is reason to believe that atrocities are about to happen, the United States should engage in preventive diplomacy—by which I mean diplomacy backed by force, followed if necessary, by force backed by diplomacy. One need not advocate an open-ended commitment to humanitarian intervention to believe that there are times—such as Kosovo—when diplomacy finally gives out and collective military intervention becomes appropriate, feasible and indeed the only way to halt or prevent the mass slaughter of civilians. As the Dayton Accords⁸⁶ demonstrated, sometimes proactive diplomacy alone is not enough. For diplomacy to succeed in bringing about the peaceful settlement of intractable disputes, behind the diplomats must stand the threat of collective military action.⁸⁷

Third, promoting democracy in all of its dimensions: in the same way as disease offers a symptom of unhealthy bodies, human rights abuse tends to be a symptom of unhealthy governments, or more fundamentally, the absence of democratic self-government. When citizens cannot govern themselves, it usually follows that they will also not be able to speak or assemble freely, to worship as they wish, to expect justice from the courts, or to find fulfillment of their economic and social needs. This, the only long-term solution to human rights abuse is the development of new government structures worldwide that will lead to fewer human rights abuses by giving people more channels of governance within their own societies.

Led by Secretary Albright, the Clinton Administration made democracy promotion a core priority, trying to build democracy abroad along five dimensions.⁸⁸ First is the *normative* dimension. Instead of talking about human

Prevention and Response (Oct. 29, 1999), *available at* http://www.state.gov/www/policy_remarks/1999/991029_scheffer_rwanda.html.

85. On a smaller scale, I also participated in a more informal effort to develop a governmental/nongovernmental network to give early warning to prevent civilian massacres in Colombia. While it is hard to quantify the number of massacres that did not occur amid a horrifying number that did take place during the last few years, I have reason to believe that the early warning network did yield some successes.

86. For a description of the Dayton Accords, see generally HOLBROOKE, *supra* note 29.

87. See HOLBROOKE, *supra* note 29 (describing the role of force in Dayton). For a description of how diplomacy backed by force worked in Kosovo, see generally CLARK, *supra* note 11.

88. As a child of Czech refugees, whose parents had fled first from the Nazis, then from the communists, Madeleine Albright repeatedly exhibited a visceral and genuine commitment to the promotion of democracy and human rights as a core element of her approach to United States foreign policy. For recent biographies, see generally ANN BLACKMAN, *SEASONS OF HER LIFE: A BIOGRAPHY OF MADELEINE KORBEL ALBRIGHT* (1998); MICHAEL DOBBS, *MADELEINE ALBRIGHT: A TWENTIETH-CENTURY ODYSSEY* (1999). Although Albright will surely be

rights simply in terms of the right to be free of various kinds of governmental violations, we self-consciously moved to a broader notion: that in the twenty-first century, people have more than isolated and disconnected rights to freedom of assembly, freedom of speech and other political and civil rights. Instead, they have a basic right to a form and structure of government that guarantee those rights—in other words, they have a right to democracy itself.⁸⁹

The right to democratic governance, we argued, is both a means and an end in the struggle for human rights. Freedom of conscience, expression, religion and association are all bolstered where democratic rights are guaranteed. Rights to a fair trial and to personal security are enhanced in genuine democracies. Elected leaders gain legitimacy through the democratic process, allowing them to build popular support, even for economic and political reforms that may entail temporary hardships for their people. Thus, democracy and genuine respect for human rights remain the best paths for sustainable economic growth. While an authoritarian development model may generate prosperity for a time, history suggests that authoritarianism cannot sustain economic growth over the long term in the face of corruption, cronyism and the continued denial of citizens' rights.⁹⁰

Moreover, we argued that democracy must be about more than just elections, but also the creation of democratic institutions and the fostering of democratic culture. Genuine democracy requires not just elections, but respect for human rights, including the right to political dissent; a robust civil society; the rule of law, characterized by vibrant political institutions, constitutionalism and an independent judiciary; open and competitive economic structures; an independent media capable of engaging an informed citizenry; freedom of religion and belief; mechanisms to safeguard minorities from oppressive rule by the majority; and full

remembered as the first female Secretary of State, I am firmly convinced that her tenure was distinctive because of this agenda, not solely because of her gender. See THOMAS W. LIPPMAN, MADELEINE ALBRIGHT AND THE NEW AMERICAN DIPLOMACY (2000).

89. See James Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 91 (Gregory H. Fox & Brad R. Roth eds., 2000); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 65 (1992); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 Yale J. Int'l L. 539 (1992); Henry J. Steiner, *Political Participation as a Human Right*, 1 Harv. Hum. Rts. Y.B. 77 (1988); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

90. Perhaps the best illustration is the contrast between Indonesia, where in 1998 a Suharto regime lacking both accountability and transparency saw an economic downturn quickly deteriorate into a political crisis. See generally S. N. Vasuki, *Jakarta Looks Set to Clash With Its Main Benefactors*, BUS. TIMES (SINGAPORE), March 3, 1998, at 7. Indonesia can be contrasted with the Republic of Korea, where at around the same time genuinely democratic elections gave President Kim Dae Jung—a former political prisoner—the popular support he needed to implement austerity measures and economic reforms. These events also confirmed something that I, as an Asian-American, had believed all my life: that nothing about “Asian values” precludes respect for democracy, human rights and the rule of law, even in times of economic crisis.

respect for women's and workers' rights. These principles—combined with free and fair elections—form the basis for a culture of democracy.

More than fifty years have passed since Article 21 of the Universal Declaration of Human Rights proclaimed that “the will of the people shall be the basis of the authority of government . . . expressed in periodic and genuine elections.” To modernize that understanding in order to reflect the fuller notion of democracy described above, the Clinton Administration promoted two successive “Right to Democracy” resolutions at the U.N. Human Rights Commission, both of which passed without dissent,⁹¹ as well as a Right to Democracy Resolution that passed the U.N. General Assembly in the fall of 2000.⁹² In June 2000, some 106 countries that have chosen a democratic course gathered in Warsaw, at the first biennial meeting of the “Community of Democracies.” These nations adopted the landmark Warsaw Declaration, which declared democratic governance to be a human right and committed the participating nations to protect and preserve that right both multilaterally and unilaterally.⁹³

The Clinton Administration sought to promote democracy along a second dimension as well, which I call “the horizontal dimension.” The United States now spends close to \$1 billion annually on democracy assistance.⁹⁴ But if you divide the countries who receive that assistance into four categories: the established democracies (such as Western Europe); countries just entering the democratic column (such as Indonesia and Nigeria); countries just slipping back

91. See UNCHR Res. 1999, 55th Sess., 57th mtg., U.N. Doc. E/CN.4/RES/1999/57 (1999) (51-0, with two abstentions) (April 27, 1999), at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.1999.57.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.1999.57.En?Opendocument); UNCHR Res. 2000, 56th Sess., 65th mtg., U.N. Doc. E/CN.4/RES/2000/62 (2000) (45-0, with eight abstentions) (April 26, 2000) at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2000.62.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.62.En?Opendocument)

92. GA Res. 107, 55th Sess., Agenda Item 114(b), U.N. Doc. A/Res/55/107 (2001), available at <http://www.un.org/documents/ga/res/55/a55r107.pdf>. (March 14, 2001).

93. The text of the Warsaw Declaration may be found at http://www.state.gov/www/global/human_rights/democracy/000627_cdi_warsaw_decl.html (last visited Nov. 21, 2001). Supporting documents may also be found at http://www.state.gov/www/global/human_rights/democracy/cdi_text.html (last visited Nov. 21, 2001). The Warsaw Conference will be followed by successive world gatherings in Seoul in November 2002, in Santiago, Chile, in 2004, Bamako, Mali in 2006 and Lisbon, Portugal, in 2008, along with a number of developing nation conferences (following on the New and Restored Democracies Conference in Cotonou, Benin in December 2000), as well as various NGO conferences (including the World Forum on Democracy, an NGO forum in Warsaw that ran parallel to the 2000 intergovernmental meeting).

94. According to the Clinton Administration's post-Cold War strategic plan for U.S. foreign policy, the promotion of democracy and the protection of human rights together constitute one of America's core national interests. That plan required each U.S. embassy abroad to submit to Washington an annual plan for promoting democracy. Between 1993-2000, the Clinton Administration more than doubled the total budget in support of this national interest from about \$300 million in 1993 to over \$700 million in 2000. Harold Koh, *Advancing Democracy: The Clinton Legacy*, Carnegie Endowment (Jan. 12, 2001), <http://www.ceip.org/files/events/KohEvent.asp?p=1>.

from democracy (such as Pakistan and Fiji); and countries that are authoritarian states, far removed from the democratic ideal (such as China and Cuba), the results are surprising. A much higher percentage of United States democracy assistance goes to the countries on the margins—the established democracies and the established authoritarian regimes—than to the countries in the middle, where each marginal dollar would presumably make the greatest difference.⁹⁵ To redress this problem, Secretary Albright designated four countries in the middle zones as “democracy priority countries”—Colombia, Indonesia, Nigeria and the Ukraine—to make sure that our government properly evaluates where democracy deficits exist, and then devotes its resources to areas where they are likely to pay off the most. In addition, my Bureau began to develop a consistent diplomatic protocol for addressing countries in which interruptions of democracy occur—for example, such disparate countries as Fiji, Peru, Ecuador, Côte d’Ivoire and Pakistan—in an effort to ensure that the United States will maintain a consistent standard for evaluating whether or not such a country is on a reasonable pathway back to a democratic government.

Third, we focused on the *vertical dimension* of democracy policy, what Tom Carothers has called “high democracy policy” versus “low democracy policy.”⁹⁶ Anyone who has worked in or visited a United States embassy abroad knows that foreign policy priorities (which are coordinated by the United States embassy) may not be matched by aid programs and public diplomacy messages, which are managed on the ground by the Agency for International Development (AID) mission and the United States Information Agency office (USIA) in the same capital. As a result, our democracy money and democracy talk have too often failed to follow policy directives set by the Secretary of State, our central foreign policy spokesperson. During the second Clinton Administration, Congress mandated and the Administration implemented an agency reorganization plan that began a process of coordination and institutional integration between AID, USIA

95. Congress is fond, for example, of appropriating large sums of money to promote the democratic forces in such democratic wastelands as Cuba, Iraq, Sudan and China, for example. *See, e.g.*, Cuba Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2315; Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178; Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105-118, 111 Stat. 2386; Foreign Operations, Export Financing, and Related Programs, Appropriations Act of 1994, Pub. L. No. 103-87, 107 Stat. 931.

96. *See* Thomas Carothers, *Democracy, State and AID: A Tale of Two Cultures*, FOREIGN SERVICE JOURNAL, Feb. 2001, at <http://www.ceip.org/files/Publications/FSarticle.asp?p=1> (last visited Nov. 21, 2001). By “high policy,” Carothers means the broad policy objectives that dictate promoting democratic institutions in particular countries; and by “low policy,” he means the nuts and bolts process by which democratic assistance funds are actually distributed from country to country, and among institutions within a particular country. *See generally* CAROTHERS, *supra* note 18.

and the State Department, under the Secretary's oversight.⁹⁷ Not only did that make possible for the first time an integrated U.S. government democracy budget, but it also allowed the State Department, through the Bureau of Democracy, Human Rights and Labor, and the regional bureaus, to establish a broader list of democracy priority countries in each geographical region, which should receive a disproportionate share of the policy supervision, democracy assistance and public diplomacy budget.

Fourth, the *multi-lateral dimension*. Before the Community of Democracies, there has been no notion that democratic governments should engage with each other *as democracies* in inter-governmental fora to coordinate common positions, fund common interests and promote common values. Ironically, the United Nations system is full of caucuses: the landlocked states of the world, the small island nations, the Islamic Conference, the nonaligned nations all deal as caucuses or as collectivities in various international fora. So why not democracies? And thus a key goal of the Community of Democracies gathering was to create a collective democratic consciousness to coordinate positions on global matters of mutual concern: for example, the global AIDS crisis, global terrorism, environmental degradation and trafficking in drugs, women and children.⁹⁸

97. On November 3, 1961, President John F. Kennedy signed the Executive Order creating the U.S. Agency for International Development. The Foreign Affairs Reform and Restructuring Act of 1998 provided congressional authority to reorganize and strengthen the foreign affairs agencies by, inter alia, integrating USIA's strategic approach to public diplomacy into the State Department's foreign policymaking and strengthening the State-USAID relationship to enhance the coherence of our foreign policy, development and humanitarian programs. H.R. 277, 105th Cong. (1998) (enacted).

98. The lion's share of the credit for conceiving and operationalizing this multilateral dimension of democracy-building goes to Secretary Albright herself, as co-sponsor of the Warsaw gathering, and my colleague and friend, Mort Halperin, the Director of her Policy Planning Staff. In recent years, multi-lateral development banks, global and regional inter-governmental organizations have all become involved in the promotion of democracy through diplomatic or programmatic means, although democracy-promotion policy as a whole still suffers greatly from a lack of comprehensive strategic planning and coordination. In his speech to the Warsaw conference, U.N. Secretary General Kofi Annan embraced these goals, declaring:

I am delighted to associate myself today with a new coalition of democracies, dedicated to expanding the frontiers of freedom and to ensuring that, wherever democracy has taken root, it will not be reversed. As Secretary General of the United Nations, I am particularly gratified that this new coalition is meeting [sic] to support the founding values of our Organization, as set out in the Charter and in the Universal Declaration of Human Rights. Indeed, the theme of this conference: 'Towards a Community of Democracies' represents my own most profound aspiration for the United Nations as a whole. When the United Nations can truly call itself a community of democracies, the Charter's noble ideals of protecting human rights and promoting 'social progress in larger freedoms' will have been brought much closer.

Kofi Annan, U.N. Secretary General, Closing Remarks to the Ministerial (June 27, 2000), at <http://democracyconference.org/kofiannan.html> (last visited Nov. 8, 2001). In November 2000,

Fifth and finally, the Clinton Administration sought to bolster the *private/public dimension* of democracy promotion, by trying to coordinate its democracy-promotion efforts closely with private transnational actors such as the National Endowment for Democracy, the National Democratic Institute, the International Republican Institute, democracy-building NGOs such as the Open Society Institute, as well as a range of other nongovernmental organs devoted to development of civil society, democratic institutions, and rule-of-law structures.⁹⁹ In many respects, the toppling of Milosevic, and the relatively smooth insertion of the Kostunica government in Serbia can be seen as a triumph of this public/private partnership. Over a period of several years, the United States, the EU, the OSCE and numerous private groups worked hand-in-glove to support the civil society institutions that Milosevic was trying to oppress so that they could be part of the democratic culture that ultimately overthrew him. Even in countries that have not yet adopted a democratic form—particularly the monarchies and authoritarian governments of the Middle East and North Africa, such as Morocco, Jordan, Algeria, Syria and Tunisia—the public/private network can play a critical role in creating space for civil society groups to operate and express their views without government oppression.

In addition to building democracy along these five dimensions, the United States government faces a final significant challenge: namely, what I would call “bipartisanizing” the democracy-promotion agenda. Like the corruption agenda, the good-government agenda, the rule-of-law agenda, and the religious-freedom agenda, the U.S. support for democracy promotion agenda should not be turned on and off every four years depending on who is in control of the White House or Capitol Hill. The United States as a whole has an interest in the globalization of freedom, both as a means to conflict-prevention and economic development and as an end in itself. Thus, without regard to which party is in power, the U.S. government’s role in fostering the globalization of human freedom should be nurtured to ensure the time-honored American goal best expressed in Lincoln’s

U.N. Secretary General Kofi Annan issued a follow-up report calling for extensive reforms to U.N. efforts in democracy-promotion.

99. In recent years, non-governmental organizations devoted to the promotion of democracy have proliferated, both in the United States and abroad. Of the U.S.-based groups, some, such as the National Endowment for Democracy (NED) and its four allied organizations, provide significant grants and technical training to support reformers in both emerging democracies and authoritarian societies. *See supra* note 18. Others conduct research, such as the Freedom House’s annual global review of democratic development; the NED’s International Forum for Democratic Studies, which edits the *Journal of Democracy*; the Democracy and Rule of Law Project at the Carnegie Endowment for International Peace which produces surveys of U.S. and international assistance programs; the new Institute for Global Democracy at the Stimson Center (run by my former State Department colleague David Yang); and the democracy-promotion work of human rights NGOs, such as Amnesty International, Human Rights Watch and the Lawyers Committee for Human Rights.

Gettysberg Address: that government of the people, by the people, and for the people shall not perish from this earth.

C. Human Rights Strategy: The Clinton-Albright Doctrine

One final word before I turn to the September 11 tragedy. In the new millennium, the United States should not simply apply the above principles piecemeal, but rather as part of a much larger human rights strategy.

Let me suggest that in the twenty-first century, the U.S. government must promote democracy and human rights worldwide—including at home—both as ends in themselves and as critical means to a safer, healthier, more prosperous process of globalization. One of the most overlooked global trends of the last thirty years is what I will call the “globalization of freedom”—the expansion of global freedom from fewer than twenty-five democracies worldwide only thirty years ago, to some 120 today.¹⁰⁰ The United States should support the growing globalization of human freedom, not just as an end in itself, but also because more global freedom provides needed and humane solutions to modern global problems, such as environmental degradation, trans-border trafficking and refugee flows, the spread of global AIDS, international crime and terrorism.

This, in my judgment, constitutes the real Clinton-Albright doctrine. Some commentators have dubbed as the “Clinton Doctrine” the notion of humanitarian intervention (of the kind pursued in Kosovo), that is, commitment of U.S. military force to promote human rights in situations where there are otherwise no discernible U.S. interests. In my judgment, this confuses the tip with the iceberg. The broader goal of the Clinton-Albright doctrine was to assert that promotion of democracy and human rights is always in our national interest. The goal of American foreign policy is thus to fuse power and principle, by promoting the globalization of freedom as the antidote to other global problems, resorting to force only in those rare circumstances where all else fails.

When I joined the State Department, my students at Yale gave me a going-away present, a set of calligraphy scrolls that, in Chinese characters, bore one of my father’s favorite sayings: “Theory without practice is as lifeless as practice without theory is thoughtless.” In government, I learned the greatest irony of modern policymaking: that those with influence have too few ideas, while those with ideas have too little influence. In the academic world, enormous energy goes into the development of complex theoretical approaches that fail any reality check and are impossible to apply. On the other hand, in the bureaucracy, critically important decisions are regularly made with too little thought, too little attention to lessons of the past, and no clear guiding framework. To set a better framework for twenty-first century human rights policy, we need to find the proper balance between the practical and the theoretical, between principle and praxis. In my

100. For statistical information, see Freedom House survey, *supra* note 2. See Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305 (2001).

judgment, consistent application of these four principles: telling the truth, consistency toward the past, present and future, and this broader strategy of promoting the globalization of freedom as an antidote to other global problems, represents the best long-term approach to United States human rights policy in the twenty-first century.

II. AFTER SEPTEMBER 11

On September 11, 2001, three airplanes, apparently hijacked by terrorists of Osama bin Laden's Al-Qaeda network, were flown into the World Trade Center and the Pentagon, killing some 3,000 innocent civilians from many different nationalities. How should the general principles and strategies I have outlined affect the way that we, as Americans, should respond to these horrible events? This tragedy will test all of principles that I have discussed above: our commitment to global democracy, human rights engagement abroad and at home, pursuing accountability, and telling the truth. Let me discuss each of these in turn.

A. *Global Democracy*

First, this is a test of our commitment to global democracy. This crisis tests not just our national resolve, but our capacity as the world's leading democracy for global leadership. As we have been graphically shown, what has been placed at risk here is not just American security but the entire postwar system of free global transport, communications, markets and self-government that the United States has helped to build. At stake is what I have called the "positive face of globalization"—the ability we had come to take almost for granted: to fly across borders at a moment's notice, to invest money in 24-hour worldwide markets, or to communicate with others around the world at any moment by cell phone, e-mail, fax, all without fear or impediments. It is that global freedom, that positive face of globalization, that has been put in jeopardy by the September 11th tragedy and its aftermath. Thus, we cannot think of this as a clash of civilizations, or a battle between the United States and Islam. We must think of it as a battle between the post-Cold War "Free World" and the network of Global Terrorists,¹⁰¹ which is a fight we cannot win unilaterally and a fight in which all peace-loving nations have a stake. That means that we must treat this first and foremost as a challenge to our

101. Considerable debate still rages over the precise definition of global terrorism. In my view, a usable definition is that recently given by the United Nations General Assembly:

[C]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them

G.A. Res. 55/158, U.N. GAOR, 55th Sess., Agenda Item 164, at 2, U.N. Doc. A/Res/55/158 (2001), at <http://www.un.org/documents/ga/res/55/a55r158.pdf>. (last visited Nov. 8, 2001).

capacity as a global leader to use the constructive face of globalization to overcome its most destructive face.

The media likes to call this the Second Pearl Harbor. But the Pearl Harbor analogy tends to mislead us into thinking that the only appropriate response would be a massive military one. The more instructive historical analogy is more likely Vietnam, where we learned that we cannot win an unconventional war with conventional methods, nor can we simply declare all-out war without rules, concern for civilian casualties, or exit strategy against a shadow aggressor. The strategy to save democracy from terrorism will be quite different from the more conventional methods that we used to save democracy from fascism. The common tie that binds World War II with today is the need to build a durable coalition that mobilizes those other countries that share our values: in this case, the 120 countries of the world with a stated commitment to the democratic path.¹⁰² In short, the strategy outlined above calls on us to use the *globalization of democracy* as an antidote to the *globalization of terror*.

How, concretely, should this be done? First and most obviously, deliberate and forceful use of military force will be a critical and necessary element of our response. But in designing an effective strategic response, what is most massive will not necessarily prove to be most effective.

Second, to prevent future abuses we need to back up our use of force with energetic diplomacy, and our diplomacy with the threat of force. Our President, Secretary of State and diplomats abroad must line up material—and not just rhetorical—support, not just from the U.N., NATO and G-8 members, but also from member states of the Islamic Conference, Organization of American States, Association of South East Asian Nations and Organization of African Unity. We

102. Indeed, in the Warsaw Declaration first signed at the Community of Democracies meeting in Warsaw, Poland in June 2000, the 106 governments represented there declared: "We resolve to strengthen cooperation to face transnational challenges to democracy, such as state-sponsored, cross-border and other forms of terrorism, . . . and to do so in accordance with respect for human rights of all persons and for the norms of international law." Three days after the September 11th tragedy, the two original sponsors of the Warsaw conference, former U.S. Secretary of State Madeleine Albright and former Polish Foreign Minister Bronislaw Geremek, issued a statement recalling that provision in the Warsaw Declaration and stating:

We believe it is critical that the democratic states of the world cooperate together in developing and implementing effective measures against terrorism, including steps to bring to justice those who carry out terrorist acts or who harbor and otherwise provide support to terrorists. We call upon the states that endorsed the Warsaw Declaration to honor this commitment and to work together to respond effectively to these cowardly and unspeakable acts. Specifically, we urge the members of the convening group of the Community of Democracies to use this forum to debate and implement appropriate steps consistent with respect for human rights and international law.

Facsimile entitled "For Continuation of the Initiative of Warsaw Declaration 'Towards Community of Democracies,'" from former Madeleine Albright, Secretary of State, to Harold Hongju Koh, former Assistant Secretary of State for Democracy, Human Rights and Labor (Sep. 19, 2001) (on file with author and *Saint Louis University Law Journal*).

need support not just from governments but also from such affected private entities as corporations, banks, NGOs and the media. As in the Balkans, diplomacy and force must be applied hand in glove; as in the Gulf War or Kosovo, we need to build a coalition that will hold together to achieve our long-term goals. The Gulf War and Kosovo taught us that building and maintaining such a global coalition is hard work. We need to rally and lead our allies, not bully them. We have to listen to our allies, not just make demands of them. We need to avoid "quid-pro-quo coalition-building" in favor of deeper alliances, in which each country commits itself to the cause not just because it might be the next victim, but because it has just as much at stake as we do in the positive face of globalization: the global system of free transport, communication, markets, and open societies that the terrorists have put in jeopardy.

Third, we must use aggressive counter-intelligence and law enforcement techniques. While obviously we cannot treat this as a law enforcement problem alone, neither should we accept the recent conventional wisdom that somehow this is war, not a law enforcement matter. International criminals operating as part of an international criminal network used a variety of criminal techniques to commit gross acts of international terrorism. Over the past half century, we have built up an elaborate international network of anti-hijacking and anti-terrorism treaties, global investigation agencies like Interpol, and intelligence-sharing protocols, all to be deployed at a time like this.

Fourth, we need to use economic sanctions, tracing and freezing the financial assets that these terrorist network and their state supporters use. If we are going to find Osama bin Laden and his associates, the most effective approach will be to follow the money. To do so, we need to reinforce the global law enforcement network with a trans-national private/public network of governments, overseas banks and financial institutions that can cooperate to make sure that states do not launder or harbor terrorist profits with impunity. If, as has been recently reported, Al-Qaeda is financed in part by conflict diamonds from Sierra Leone, the United States can cut off that lifeline by supporting the so-called "Kimberley Process:" a public/private network of diamond-producing and trading countries, human rights NGOs and diamond industry representatives that has been attempting to develop a comprehensive system to eliminate so-called "conflict" or "blood diamonds" from the legitimate transnational diamond trade.¹⁰³

103. The Kimberley Process represents a complex variation of the private-public negotiating process that created the voluntary principles for the extractive industries described in Part I.B above. The nations, human rights activists and industry representatives who first convened in Kimberley, South Africa, have been negotiating the terms of a diamond control regime that would track every diamond export, import and re-export transaction through monitoring, audited chains of custody, criminal penalties, tamperproof packaging, and standardized public record-keeping. At this writing, the United States, the world's largest importer of diamond jewelry, has not yet accepted the Kimberley Process's proposed documentation and record-keeping requirements. Congress has been considering versions of a diamond import bill supported by the diamond

Fifth and finally, this will be as much a test of our ability to build as of our ability to bomb. In responding, we need to work not just with democratic governments, but also with the forces of democratization in even the most despotic countries. Some have talked about “ending” countries that support terrorism.¹⁰⁴ But countries are not monoliths. In every state—and that includes Afghanistan and Iraq—there are forces of democratization and forces of terror and lawlessness. Just take a look at Serbia, where only a few months ago Slobodon Milosevic ruled by terror, but which now has undergone a peaceful transition to the democratic government of President Kostuniča. In the months ahead, it will be as important what we choose to do *with* foreign countries as what we do *to* those countries.

If we are to have any chance of ending for all time the practice of states harboring terrorists, we need to support the law-abiding civil society groups in those countries that would pursue a different path. In so doing, we need to use carrots and not just sticks. We need to give foreign and development aid, and we need to consider such measures as debt relief for the countries who need it most. We need to keep up our democracy-building and rule-of-law programs, not just in the countries whose help we will need for this anti-terrorism struggle, but in other parts of the world (especially Africa), where democracy is weak.

Most of all, we need to remember that the assault on globalization that we saw on September 11 is only a more violent and extreme form of the anti-globalization sentiment we have seen in Seattle, Genoa and elsewhere in the world. That sentiment grows out of a disturbing, but understandable, fear that globalization is widening the gap between the haves and the have-nots, is threatening local culture and autonomy, and is imposing western values on the world in the name of universal values. If we are to persuade the next generation that globalization better serves their self-interest than terrorism, we must contest and defeat bin Laden’s arguments in the court of public opinion. Osama bin Laden is neither Lenin nor

industry and human rights, humanitarian and religious groups, which would prohibit the import of diamonds from countries that have not met Kimberley standards. See Clean Diamond Trade Act, S.2027, 107th Cong. (2002). See generally Holly Burkhalter, *Blood on the Diamonds*, WASH. POST, Nov. 6, 2001, at A23.

104. Shortly after the attack, for example, Paul Wolfowitz, the Deputy Secretary of Defense, said, “[I]t’s not just simply a matter of capturing people and holding them accountable, but removing the sanctuaries, removing the support systems, [and] *ending states who sponsor terrorism*.” Dan Ackman, *U.S. On Guard*, <http://www.forbes.com/2001/09/14/0914disasterday4.html> (Sept. 14, 2001) (emphasis added) (last visited Feb. 8, 2002). Asked about that comment, Secretary of State Colin Powell responded:

We are after ending terrorism. And if there are states and regimes, nations, that support terrorism, we hope to persuade them that it is in their interests to stop doing that. But I think ending terrorism is where I would like to leave it, and let Mr. Wolfowitz speak for himself.

On-the-Record Press Briefing, Secretary Colin L. Powell, Remarks to the Press (September 17, 2001), at <http://www.state.gov/secretary/rm/2001/index.cfm?docid=4929> (last visited Nov. 8, 2001).

Marx: he offers neither genuine political leadership nor a constructive alternative vision of the future. Through aggressive public diplomacy, particularly in the Muslim world, we must persuade the have-nots that we share their concern about finding better ways to live our common future than in a state of indefinite violence and war.

This means that we must send our young people overseas, not just to fight, but to work with other young people in countries around the world to drain the breeding grounds of anti-Western terror. We should emphasize that—far from endorsing assaults on Muslim human rights—in recent years, the United States has endured great cost to defend the human rights of Muslims in Kosovo and Bosnia and spoken out against the brutal repression of Chechen Muslims by the Russians and Uighur Muslims by the Chinese in Xinjiang Province. We should publicize the fact that scores of those killed in the World Trade Center were Muslims, as well as the ways in which the terrorists have distorted the Koran by invoking it to justify human rights abuse. We especially need to speak strongly to half of the Muslim population—the women of Islam—to remind them that if Osama bin Laden and the Taliban succeed, their quest for progress and equality will surely be set back for the rest of their lifetime. In short, we need to keep working creatively with foreign universities, NGOs, civil society groups, independent media, labor unions, women's groups and political parties to demonstrate to would-be terrorists that terrorism leads nowhere, while the globalization of freedom leads to longer-term prosperity and genuine prospects for self-government.

In sum, this is a test of our commitment to global democracy. As I have emphasized, over the past twenty years, this country has pursued a wide-ranging policy of trying to advance the globalization of freedom and democracy, both as ends in themselves and as a means to address global terrorism, one of the darkest faces of globalization. In the months ahead, maintaining the comprehensive democracy-building strategy I have described above will become more critical than ever as a means to prevent future terrorism and future human rights abuse. Promoting the globalization of freedom means that we must build more than we bomb. We must send our young people overseas, not just to fight, but more importantly, to work with other young people in countries around the world creatively to drain the breeding grounds for future terrorists.

B. Human Rights Engagement

Second, this is a profound test of our commitment to *human rights engagement*, both abroad and at home. We must not make the mistake of concluding that somehow three planes hitting three buildings have taken us back to a state of nature in which there is no law and no rules. We need to remember that over the years, we have developed an elaborate system of domestic and international laws, institutions, and decision-making procedures, precisely so that they will be consulted and obeyed, not ignored, at a time like this.

In thinking about this crisis, we need to ask not just what the law *permits* but which course of action most closely comports with both the spirit and the letter of the law. If there is such a “law-friendly” course, we should follow it, because doing so will keep the law on our side, will keep us on the moral high ground, and will preserve the vital support of our allies, international institutions, and the watching public as the crisis proceeds. In evaluating the consistency of our action with international law and human rights, the best single benchmark will be the *number of innocent civilians—of whatever nationality—who are killed, injured, or whose human rights are violated by acts committed on all sides of this crisis.*

In this situation, international law is not a straitjacket. Under international law, no one should be able to kill 3,000 innocent civilians simply for going to work in the morning, and then threaten to do so again with impunity. International law recognizes that the September 11 strikes constituted not just “armed attacks,” but crimes against humanity, and if you consider them acts of war, war crimes as well. Article 51 of the U.N. charter recognizes each member country’s “inherent right . . . of self-defence if an armed attack occurs”¹⁰⁵ Moreover, the U.N. Security Council has passed two broad resolutions—the first passed the day after the attack and the second several weeks later—clearly authorizing U.N. member states to use authorized force against both Osama bin Laden and the Taliban who offer him a safe haven.¹⁰⁶ In addition, NATO has invoked Article 5 of the NATO charter; authorizing the use of force if it is determined that this was attack from abroad against a NATO member.¹⁰⁷ What this means is that our government has considerable legal freedom to pursue precisely the kind of broad-based strategy I have outlined above: a forceful and targeted military response, as part of a larger diplomatic, economic, counterintelligence, law enforcement, public diplomacy, and democratization strategy.

But if we choose to treat this as a war, it follows that we must obey the international laws of war. Terrorists scorn the laws of war, but responsible democracies obey them. That means that our military exercises must scrupulously avoid targeting civilians, using indiscriminate weapons, or carelessly striking civilian targets or humanitarian aid centers.¹⁰⁸ For in the repressive societies

105. U.N. CHARTER art. 51, at <http://www.nato.int/docu/basicxt/bt-un51.htm>.

106. See SCOR Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/Res/1368 (2001); SCOR Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/Res/1373 (2001).

107. Article 5 of the NATO Treaty requires the NATO parties to assist the attacked country—with armed force if necessary—in exercising its right of individual or collective self-defense under article 51 of the U.N. Charter.

108. See, e.g., Elizabeth Becker & Eric Schmitt, *A Nation Challenged: The Bombing; U.S. Planes Bomb a Red Cross Site*, N.Y. TIMES, Oct. 27, 2001, at A1; *Cluster Bombs in Afghanistan*, A HUMAN RIGHTS WATCH BACKGROUNDER (Oct. 2001), at <http://www.hrw.org/backgrounder/arms/cluster-bck1031.htm> (last visited Nov. 8, 2001) (charging that the U.S. has been using CBU-87 cluster bombs, which have wide dispersal pattern and cannot be targeted precisely, as well as a significant non-explosion rate, which leaves them lying on the ground like dangerous de facto antipersonnel ordnance).

where we are most likely to strike back militarily, such as Afghanistan and Iraq, the innocent civilian population is just as much victims of human rights abuse as were the Americans who died on September 11th.

In the weeks ahead, we must demonstrate that we have genuinely internalized our international legal commitments to respect human rights. *As a rule of thumb, the more massive, the more unilateral, the more indiscriminate, and the more prolonged our use of force is, the more likely it is to violate international law.* If we choose to respond to this tragedy by killing innocent civilians abroad, we will not honor our civilian dead, we will lose the moral high ground, we will not end the cycles of retaliation and we will almost surely alienate the very allies, human rights groups, and moderate Muslim states whose participation in the durable coalition we will need to win this struggle.

In counting up the innocent civilians who will be affected, we must also include the thousands of Afghan refugees this conflict has already generated.¹⁰⁹ We must make sure that our military action does not endanger humanitarian aid workers on the ground or hamper delivery of emergency food aid, or Afghans could die in refugee camps on a scale comparable to the original September 11 attacks.

Nor can we forget the human rights of civilians in the countries we have enlisted in our antiterrorism campaign. Several countries that we have sought to enlist in the antiterrorism campaign, including China, Pakistan, Russia, Saudi Arabia and Uzbekistan, have already signaled that they would like the United States now to ignore their human rights abuses at home in return for their help.¹¹⁰ Many countries, particularly in Central Asia, have imposed radical restrictions on human rights at home in the name of fighting terrorists.¹¹¹ During the Cold War,

109. See Rajiv Chandrasekaran, *Predicted Outpouring of Afghan Refugees is More Like "Trickle;" Many Don't Feel Threat, or Lack Funds for Trip*, WASH. POST, Nov. 1, 2001, at A21 (estimating about 80,000 refugees entering Pakistan after 25 days of U.S.-led attacks, in addition to some 2 million who are already there from previous conflicts).

110. See, e.g., C. J. Chivers, *A Nation Challenged: Complications; Alliance With U.S. Spotlights Uzbek Rights Abuses*, N.Y. TIMES, Oct. 30, 2001, at B1.

111. The most prominent examples have been Russian crackdowns in Chechnya, the Uzbekistan government's crackdown on Muslims, and the Chinese repression of Uighur Muslims in Xinjiang. As Secretary Albright said in Uzbekistan in April 2000:

Since narcotics traffickers and terrorists know no borders, it is important that we work together to counter the threat they pose But at the same time the United States will not support any and all measures taken in the name of fighting drugs and terrorism or restoring stability. One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly—and that means applying the rule of law fairly and consistently. *We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capacities while at the same time promoting democracy and human rights. By contrast, indiscriminate government censorship and repression can cause moderate and peaceful opponents of a regime to resort to violence. It can turn civilians who have*

we too often overlooked anti-democratic behavior and human rights abuses by friendly autocrats to enlist their aid in the "war against communism."¹¹² It would be equally short-sighted and would undermine our longer-term commitment to promote democratization described above if we were now to overlook similar behavior to promote our war against terrorism. We simply trade short-term gain for longer-term costs, if in the name of fighting terrorists, we cease or diminish our human rights engagement with our coalition partners.

Moreover, we should remember that this is a test of our commitment to human rights not just abroad, but also at home. However much contempt the terrorists showed for human rights, we should respect those rights. This is a new experience for us. It is the first foreign attack of this magnitude on our mainland for nearly 200 years. In a way that we have not, fellow democracies such as Israel and Great Britain have had far greater experience with balancing a forceful crisis response, minimizing insecurity in our homes, without surrendering their commitment to civil liberties.

When we tote up the injuries to innocent civilians from acts committed in this crisis, we need to count in the following: those discriminated against based on racial profiling;¹¹³ those whose privacy is unlawfully invaded under new antiterrorism authorities; those immigrants whose student visas are unlawfully withdrawn in the name of rooting out terrorists; and those Muslim-Americans who are subjected to hate crimes that go unprosecuted.

Many have called this the second Pearl Harbor. But as an Asian-American, I cannot forget that the first Pearl Harbor triggered the internment of tens of thousands of loyal Americans, based solely on their ethnicity. What few recall is

never before been interested in politics into extremists. These kinds of measures are not only abusive of human rights—they are also likely to fail. It is essential to distinguish between people who advocate or commit criminal acts and those who are simply expressing their religious faith. There is no more fundamental right in any democracy than the right of a person to be judged by his or her actions rather than by assumptions about his or her beliefs or heritage or ethnicity. For instance, it would be a terrible mistake for any government to treat peacefully practicing Muslims as enemies of the state. Many Islamic leaders are playing a very constructive role in helping this region adjust to the demands of the new era.

Madeleine K. Albright, Secretary of State, Speech at University of World Economy and Diplomacy (April 17, 2000), at <http://secretary.state.gov/www/statements/2000/000417.html> (emphasis added).

112. See discussion *supra* Part I.B. Nor should we rush blindly to embrace those we in the State Department used to call "today's democrats"—those exiles and opposition leaders who seek U.S. financial and political support in the name of overthrowing the Taliban, Saddam Hussein, or other autocrats who support terrorism, without demonstrating their own genuine commitment to promoting democratic self-government.

113. The history of our civil rights movement has been a struggle to reject invidious discrimination through racial stereotyping. We need to continue that struggle by developing reliable techniques of behavioral profiling that would allow us to detect would-be terrorists based on their conduct and motives, not on their ethnicity.

that some of the most heralded civil libertarians of the time—President Franklin Delano Roosevelt; Earl Warren, then-Attorney General of California; Supreme Court Justices Hugo Black and William O. Douglas—not only failed to challenge the Japanese internment, but they affirmatively ratified it. Unfortunately, this is not a hypothetical concern. At this writing, scores of aliens and citizens are being detained on offenses unrelated to terrorism here in the United States, and a new, sweeping antiterrorism law has been enacted that vastly expands the President's investigative and detention authorities.¹¹⁴

We cannot now relive the errors of history by condoning reckless racial profiling, brutal immigration and employment practices, and gross invasions of privacy—all conducted in the name of rooting out terrorists. The September 11 terrorists wanted to take our freedoms, but they can only succeed if we choose to help them.

C. Accountability

Third, we must pursue *accountability*, responding in the spirit of justice, not vengeance to these crimes against humanity. The terrorists committed gross violations of human rights, and we should seek to hold them accountable, not just for deterrence's sake, but to determine the facts, and to reaffirm the rule of law and the global norm against terrorism. As our response develops, we can pursue several accountability tracks simultaneously: First, the possibility of indicting Osama bin Laden and his associates in a United States court (where they have already been indicted for the 1993 World Trade Center bombing);¹¹⁵ second, the

114. In response to intense White House pressure, and after radically truncated deliberation, Congress passed—and the President signed—the so-called “USA PATRIOT Act” (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terror”), sweeping anti-terrorism legislation that would allow the Attorney General to detain non-citizens at length as suspected “terrorists” with minimal procedural safeguards. H.R. 3162, 107th Cong. (2001) (enacted). The law allows information obtained during criminal investigations—with respect to United States citizens as well as aliens—to be distributed to United States intelligence agencies without meaningful limitation on how those agencies can use the obtained information. Moreover, the legislation allows the government to conduct covert searches in furtherance of criminal investigations, for example, by entering your home office or other private place to search, take photographs, and download computer files without notifying you until after the fact. Law enforcement officials are permitted to access, use, and disseminate highly personal information in student records about U.S. and foreign students alike. In addition, officials may now use expanded wiretap authority to circumvent the probable cause requirement of the Fourth Amendment, to make chilling invasions of Internet privacy, and to eavesdrop without a warrant on conversations of citizens who are not targets of any criminal investigation.

115. Since these comments were first drafted, three Al Qaeda members have been charged in U.S. courts: Zacarias Moussaoui, the so-called “twentieth terrorist,” Richard Reid, the so-called “sneaker bomber,” and John Walker Lindh, the so-called “American Taliban.” Among the many thorny domestic legal issues that could arise in their cases are as follows: If heard in the United States, in what venue should prosecution of these terrorist acts occur? Is there any U.S. jurisdiction in which the jury pool could be said to be unbiased? Could foreign governments

possibility of trying terrorists in a foreign court, as was done in the Lockerbie case (which was tried in the Hague under Scottish law);¹¹⁶ third, if a competent and credible one could be quickly established, considering an international criminal track before an ad hoc international tribunal;¹¹⁷ and fourth, civil lawsuits in U.S. courts against terrorists, their state supporters, or their assets under U.S. law.¹¹⁸

In framing our accountability response, we should remember that domestic law, like international law, is neither a straitjacket nor a blank check. While there is talk of the struggle ahead as a "war against terrorism," we should not forget that, as a legal matter, we are neither formally in a state of war nor even in a congressionally declared national emergency. In authorizing the President to respond, Congress did not declare war, an authorization it has given only five times in our history. Thus, in the present situation, Congressional authorization did not place us into a legal state of war, which would have triggered a series of extraordinary statutory powers that authorize the President in times of declared war to seize property, businesses, and manufacturing facilities, to restrict otherwise lawful political activities, and to obtain wiretaps without a court order.¹¹⁹ Instead, Congress passed, and the President signed, a Use of Military Force resolution which declared that the September 11th attacks "pose[d] an unusual and extraordinary threat to the national security and foreign policy of the United States"¹²⁰ This resolution gave the President very broad discretion without a

lawfully refuse to extradite suspects to the U.S. because of their opposition to the death penalty? If so, would we treat them as "harboring" terrorists? Should such proceedings be open to the public? How should the FBI and intelligence agencies gather evidence so as to avoid the problems that arose in the prosecution of Timothy McVeigh? Could evidence obtained abroad in violation of Fourth, Fifth and Sixth Amendments be used (meaning by torture, truth serum or other methods of coercion not permitted under U.S. law)? Would the crimes for which defendants would be charged include international offenses? Since this lecture was first delivered, the Defense Department has announced a much-criticized program of military commissions to try suspected terrorists, but at this writing, no defendant has yet been charged before these tribunals. For my criticism of this misguided approach to accountability, see Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. (forthcoming 2002).

116. See Michael P. Scharf, *The Lockerbie Trial Verdict*, ASIL INSIGHTS (Feb. 2001), <http://www.asil.org/insights/insigh61.htm> (last visited Nov. 8, 2001).

117. See Dickinson, *supra* note 52 (arguing for an international court for terrorism). But see Koh, *The Case Against Military Commissions*, *supra* note 115, expressing doubts that such an "international track" is politically possible at this time.

118. See sources cited *supra* notes 59-63.

119. See, e.g., 10 U.S.C. § 2538 (1994) (granting power to seize a wide array of property, businesses, and manufacturing facilities); 50 U.S.C. § 1811 (1994) (allowing power to obtain wiretaps without a court order). A "state of war" could also grant the government power to restrict otherwise lawful political activities if, for example, they are deemed to "obstruct" military recruitment, 18 U.S.C. § 2388 (1994). The United States government is also granted power to "cause the closing of any facility or station for radio communication" and to authorize its "use or control" by the government, a power that obviously has profound implications in the Internet Age. 47 U.S.C. § 606 (1994) (emphasis added).

120. Authorization for Use of Military Force, 50 U.S.C. § 1541 (2001).

time limit to use “all necessary and appropriate force against those nations,” whether foreign or domestic, that “he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts”¹²¹ On its face, this language is extraordinarily broad, with its only restriction being that the President must declare some factual link between the culprit, the attack, and the possibility of future attacks.¹²²

But even in war, our Constitution makes it clear that the president is our commander-in-chief, not our king.¹²³ The Use of Military Force Resolution that was passed in September should not be confused with the infamous Gulf of Tonkin Resolution of 1964, which several presidents construed as unfettered congressional authorization to escalate the undeclared Vietnam War. The Gulf of Tonkin debacle triggered enactment in 1973 of the War Powers Resolution, whose consultation, reporting, and durational limits on presidential war-making have been the law for nearly thirty years. Far from repealing or superseding the War Powers Resolution, Congress’ Use of Military Force Resolution explicitly invoked that law.¹²⁴ This means that as this conflict escalates, the American people through their elected representatives in Congress have a legal right to receive reports of U.S. troop commitments abroad,¹²⁵ to be consulted, and to authorize the long-term maintenance of United States Armed Forces into hostile or imminently hostile situations. The War Powers Resolution’s statutory consultation requirements rest on a simple, sound idea: that to conduct a sustained bipartisan foreign policy in a time of crisis, the President should both regularly consult and genuinely listen to elected officials who do not owe their jobs to him. Thus, as with international law, there is a domestic rule of thumb: the more the President responds to the unfolding crisis by acting secretly, unilaterally, or in tension with the Bill of Rights, the more likely it is that he will violate domestic law in the months ahead.

In addition to recognizing that we are not in a state of declared war, we must also acknowledge that in an important way, we have been here before—at the founding of the Republic. At that time, pirates, privateers and other early terrorists posed as great a threat to our nation as sovereign states bent on war. Article I of the U.S. Constitution, which authorizes Congress to declare war, also gave Congress the much narrower power to “define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations.”¹²⁶ The Framers drafted the language specifically to deal with situations like those of today: where private actors—pirates and slave traders—work in tandem with

121. *Id.* § 2(a)

122. *See id.*

123. *See generally* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

124. *See* § 1541.

125. That includes, for example, a right to receive a war powers report within forty-eight hours of every new commitment of armed forces into foreign airspace or territory.

126. U.S. CONST. art. I, § 8, cl. 10.

sovereign governments to terrorize the civilized countries of the world. In 1790, Congress exercised this power by passing statutes criminalizing such international crimes as piracy and assaults upon ambassadors.¹²⁷ Not long thereafter, Congress supported President Jefferson in authorizing the Navy to retaliate against the Barbary pirates. In the past few decades, Congress has used this power to criminalize such offenses against “the Law of Nations” as attacks against aviation and diplomats, hostage-taking and theft of nuclear materials.¹²⁸

As Congress legislates with respect to the current crisis, it should again invoke its specific constitutional power over “the Law of Nations” to define the acts underlying the Pentagon and World Trade Center attacks as examples of international crimes that it has identified in the past.¹²⁹ Under the Use of Force resolution, Congress has already then authorized the President to use all necessary means to punish the perpetrators. Under that legislation, the President has discretion to punish terrorists and their supporters by military force or by treating them as international criminals, subject—as Panama’s drug-lord dictator Noriega was—to law enforcement procedures such as arrest, extradition, seizure and trial.¹³⁰ Yet significantly, by making explicit legislative reference to Article I, Section 8, clause 10, Congress would equally make clear that American military forces enforcing the “Law of Nations” are strictly bound to obey those rules of international law, for example, those rules that forbid the targeting of innocent civilians or inflicting collateral damage upon them.¹³¹

The President will want, and should have available to him, the option of military force to eradicate terrorist networks, to hold accountable any perpetrators who may be captured, and to deter their state sponsors. But if, as former National Security Adviser Samuel Berger has reported, Osama bin Laden controls up to

127. See Act of Apr. 30, 1790, ch. 9, §§ 8, 28, 1 Stat. 112, 113-14, 118 (1790).

128. See, e.g., 18 U.S.C. § 1201 (1994) (providing aircraft sabotage act); 18 U.S.C. § 112 (1994) (criminalizing attacks on internationally protected persons); 18 U.S.C. § 1203 (1994) (criminalizing hostage-taking); 18 U.S.C. § 831 (1994) (describing theft of nuclear materials).

129. By acknowledging that it had previously defined such acts as international crimes, Congress could address only judicial challenges based on the constitutional prohibition against *ex post facto* crimes.

130. See generally *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988).

131. There has been much media discussion, for example, about whether Executive Order Number 12,333, 46 Fed. Reg. 59941 (Dec. 4, 1981), available at <http://www.odci.gov/cia/information/eo12333.html> (last visited Nov. 13, 2001), and maintained through five administrations, prohibits assassination. But that Order was designed to prevent the assassination of foreign leaders, not military action against foreign terrorists. Even if one were to consider a strike against Osama bin Laden to be an assassination, as opposed to an attack on a combatant, that order can be repealed, modified, or suspended by the President himself or could be deemed to be overridden by the broad words of the Use of Military Force resolution. If there is any doubt on the subject, Congress could use the legislative solution I propose effectively to suspend, for this case, the executive ban against assassinations. That decision would leave the ban in place for other situations for which it still has meaning, such as barring intelligence agencies from assassinating foreign leaders who have not supported an armed attack upon the United States.

10,000 operatives who function in 60 countries,¹³² do we really want to go to war against all or even most of those nations? Korea and Vietnam demonstrated that protracted, open-ended and undeclared wars leave troops and presidents unsupported and legislators unaccountable.¹³³ If the President really means to treat this as a war, and invokes the war power, he should do so in consultation and with the authorization of our elected representatives in Congress. We need not shoehorn the attacks into the language of war to give our president ample authority to deal with global terrorists and their state supporters. Under the "Law of Nations Clause," Congress has abundant constitutional power to punish the perpetrators of the September 11 attacks for what they are: international criminals and violators of the law of all civilized nations.

D. *Telling the Truth*

Finally, the present crisis will be a test of American commitment to telling the truth. Just because the terrorists used our open society to shatter our aura of invulnerability, we cannot let fear drive us to choke off the very openness that has made us strong. But, it is not enough to defend our freedoms; *in the months ahead we have to use those freedoms*. What this means is that we need to speak out forthrightly about human rights violations, whether these acts are committed by terrorists, our allies, Israelis or Palestinians, the Pakistanis, the Taliban or the Northern Alliance,¹³⁴ or even by our own government officials. At home, our courts, legislators, and law enforcement officials must meticulously respect freedoms of press, travel, religion, and assembly, and avoid the kind of crisis restrictions that led to the *Pentagon Papers*¹³⁵ case and the Alien and Sedition Acts.¹³⁶ In the months ahead, as our government is called upon to do more, and as

132. *A News Hour with Jim Lehrer: How to Respond?* (Online broadcast, Sept. 12, 2001), available at http://www.pbs.org/newshour/bb/military/july-dec01/terror_response_9-12.html (last visited Nov. 11, 2001).

133. See generally Koh, *supra* note 115; JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1994).

134. While condemning repeatedly the Taliban's human rights abuses, our 1999 Country Reports on Human Rights Practices also pointed out that:

Northern Alliance members committed numerous, serious abuses. Masood's forces continued sporadic rocket attacks against Kabul. Anti-Taliban forces bombarded civilians indiscriminately. Various factors infringed on citizens' privacy rights. Armed units of the Northern Alliance, local commanders, and rogue individuals were responsible for political killings, abductions, kidnappings for ransom, torture, rape, arbitrary detention, and looting.

See 1999 COUNTRY REPORTS, *supra* note 1, available at <http://usembassy.state.gov/afghanistan/www/hr99.html> (last visited Nov. 13, 2001).

135. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*).

136. The early signs, with the panicky passage of the sweeping antiterrorism legislation and the adoption of the military commissions scheme, have not been promising on this score. For a

we as citizens are called upon to do more, there will be considerable disagreement about both ends and means. As a society, we must beware the orthodoxy of what I call "patriotic correctness." We must strongly reject the notion that it is somehow *appropriate patriotism* not to question what our government chooses to do in our name, in a time of war.

III. CONCLUSION

When we look back on the start of the new millennium, we will remember that it began not on January 1, 2000, but on September 11, 2001; the day that the United States definitively left the post-Cold War era. In this reshaped twenty-first century, globalization has both sinister and constructive faces. Over the long run, the ultimate antidote to global terrorism will not be military force alone, but the globalization of freedom.

September 11 was an attack, not just on America and Americans, but also on our commitment to human rights, democracy and the role of law. That means that we must respond to the September 11 tragedy in the spirit of justice, not vengeance. We should respond not just with American power, but also with the vision and values embodied in our commitment to human rights and the rule of law. If, as the crisis unfolds, we can remember our core commitments to global democracy, human rights engagement, pursuing accountability, and telling the truth, we can maintain our global leadership role in the new millennium, and reaffirm the fundamental values that make us Americans.

six-month assessment of the state of civil liberties after September 11, see <http://www.amacad.org/> (last visited Apr. 2, 2002).